Supreme Court U.S.
FILED
JUL 21 2003

No. 03-227

In The
# Supreme Court of the United States

USHA VAKHARIA, M.D.
*Petitioner,*

v.

LITTLE COMPANY OF MARY HOSPITAL & HEALTH CARE CENTERS, et al.,
*Respondents.*

**On Petition For Writ of Certiorari To the United States Court of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Does the spirit of the Federal Rules of Civil Procedure for a decision on the merits and the requirements of F. R. Civ. P. 56 allow a District Court to strike a nonmovant's response to a summary judgment motion *in its entirety* for failure of a portion of the response to be in accordance with Local Rule 56.1 and be the basis for granting summary judgment?

II. Does the deference accorded to the District Court by the *abuse of discretion* standard on review in enforcing Local Rule 56.1 to strike the entire response (especially when the District Court has no factual basis to do so) vitiate the *de novo* standard of review of summary judgment decisions, especially in discrimination cases?

III. Can the submission of certain documentation as evidence and the Court's ruling on the admissibility of that evidence be construed by the Court as a violation of Local Rule 56.1 and serve as the basis for striking the entire submission and for the granting of summary judgment?

IV. May a Court strike the entire response to a motion for summary judgment as a penalty for a violation of a Local Rule?

## LIST OF RESPONDENTS

Little Company of Mary Hospital & Health Care Centers
David J. Roth, M.D.
Evergreen Anesthesia & Pain Managment Services, S.C.
Kent F.W. Armbruster, M.D.
Bernard P. Flaherty, M.D.
Martin J. Phee, M.D.
Jose M.Cava, M.D.
Sister Kathleen McIntyre, L.C.M.
Claus von Zychlin
Frank J. Schaffer
George J. Cullen
Leo Hennessy
Sister Damien Young, L.C.M.
Richard M.Farrell, M.D.
Vincent Gavin
James Keane
Mary Ellen McGuire
Thomas S. Patricoski, M.D.
Michael B. Schneider
Albert C. Balderman

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Usha Vakharia, M.D, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

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## OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on March 25, 2003, is attached at App. 1. The opinion and judgment of the United States District Court for the Northern District of Illinois entered on March 28, 2002 is attached at App. 9. The order of denial of the petition for rehearing on April 22, 2003 and the petition for rehearing are attached at App. 22.

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## LOCAL RULE

Local Rule 56.1 of the Northern District of Illinois is set forth in the Appendix at App. 31.

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## JURISDICTION

Jurisdiction in the United States District Court for Count I was conferred by 28 U.S.C. Secs. 1331 and 1343 and for Count III by 28 U.S.C. Sec.1367. Jurisdiction was not based on diversity of citizenship. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. Sec. 1291 as an appeal from a final judgment of the District Court. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1) and Supreme Court Rules 10(a) and (c).

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## STATEMENT OF THE CASE

On February 20, 1992, Little Company of Mary Hospital & Health Care Centers (hereinafter "Hospital"), had two openings in its Anesthesia Department, a "back-up" or "stand-by" position in the OB/GYN section and a full time position in the surgery section. Usha Vakharia M.D., a board certified anesthesiologist, as alleged in Count I of her Second Amended Complaint, on February 20, 1992, applied for both positions. She alleged that on the basis of her color and national origin, she was not given consideration for the position in the surgical section and, on March 9, 1992, was granted interim privileges limited to the OB/GYN section. Dr. Vakharia further alleged that her completed application for permanent privileges made on August 6, 1992 was not processed in a timely manner, that after she received full privileges and full-time status in July 1993, she was not placed in the regular rotation schedule based on the same discriminatory animus, and that the defendants prevented plaintiff from full-time work at the Hospital and from contracting with patients for anesthesia services. Defendants named were the Hospital, Evergreen Anesthesia & Pain Management Services, S.C. (hereinafter "Evergreen"), David Roth (hereinafter "Roth"), Hospital CEO Sister Kathleen McIntyre, Hospital Executive Vice President Claus von Zychlin and members of the Hospital Board of Directors.

In 1994, the Hospital selected Defendants Roth and his corporation, Evergreen, as a single source provider. Prior to commencing operations as the single source provider in

1994, Evergreen offered all of the anesthesiologists in the department full-time contracts in accordance with their full-time status as required by the Hospital but offered plaintiff a contract for "stand-by" work only. The plaintiff refused to sign the back-up contract, and the Hospital suspended plaintiff because she was not a physician employed by Evergreen on April 30, 1994. She requested a hearing under the bylaws. The quality of her care to the patients in the Hospital was not an issue nor were any past or present professional problems and the Hospital said so at the hearing; the issue was whether she was classified as a back-up. However, the hearing committee denied her discovery requests and access to the credentials file to prove that she was classified as full-time. The hearing committee upheld her suspension on the basis that she was a back-up. During the pendency of the hearing, Evergreen also hired three additional full-time white, male, american-born anesthesiologists, but did not offer plaintiff those positions. The hospital approved those appointments.

In Count III of the Second Amended Complaint, plaintiff alleged that defendant Hospital violated the professional staff by-laws by a) conferring upon her only the de facto status of "stand-by" anesthesiologist, b) treating plaintiff disparately with regard to case assignment, rotation, and positions within the anesthesiology department ,c) de facto suspending plaintiff from the professional staff in a manner not provided for in the bylaws and in the suspension hearing, not permitting evidence of discrimination in contravention of Illinois law as part of the contract between plaintiff and the Hospital, and d) violating her contractual rights as a physician holding full professional staff privileges as a member of the anesthesiology department.

After the plaintiff filed her original complaint on September 13, 1994, the District Court on March 7, 1996, granted defendants' motion to dismiss all counts of her First Amended Complaint because of procedural defects and failure to comply with Federal Rule of Civil Procedure 8. The opinion is at 917 F. Supp. 1282. There was one substantive ruling: With respect to the selection of Roth and Evergreen as the exclusive provider, the court held that the plaintiff could not pursue the claim that she was denied the opportunity to organize the exclusive provider because she had failed to allege that she was qualified to be the organizer, 917 F. Supp. at 1295-96. The court also awarded a sanction of $14,135.40 under Rule 11, *inter alia*, for naming the medical staff, an unincorporated association, as defendant.[1] Although the Court of Appeals opinion states that her Second Amended Complaint "met a similar fate" (p. 2), leave to file the Second Amended Complaint was granted on June 27, 1997 and the complaint was filed on July 10, 1997. A Motion to Strike and Dismiss the Second Amended Complaint was denied on April 20, 1998.

Discovery was barred until all of the various motions to dismiss were resolved even though plaintiff had posted a discovery bond prior to commencing discovery. Thereafter the defendant Hospital did not begin to produce documents until late 1999. At the plaintiff's suspension hearing the major issue was whether plaintiff was properly classified as "stand-by.". In discovery plaintiff found documents which demonstrated that this position was untrue and further, that the Hospital attorneys, in a secret letter instructed the hearing officer, another Hospital attorney, and chairman of the panel not to allow the

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[1] The medical staff was estimated to have 500 members, hence the statement that plaintiff sued 500 defendants. No indivdual members were sued simply as members of the medical staff.

plaintiff to see these documents as she had requested. On February 27, 2001, plaintiff filed a motion to add two counts to the complaint, one of which was a breach of contract count. It alleged that the Hospital violated its bylaws by withholding documents and conducting an unfair hearing at the direction of the Hospital's attorneys in upholding the termination of plaintiff's privileges. On June 18, 2001, the court denied leave to amend on the ground of timeliness and because the defendants were preparing a motion for summary judgment. With respect to the breach of contract count, the court held that it was duplicative of Count III in the Second Amended Complaint.

On August 15, 2001, defendants filed a motion for summary judgment. The plaintiff was to respond on October 5. On October 10, the plaintiff on her motion was granted an additional 14 days.. Being unable to complete a response in that time, the plaintiff moved for additional time and on October 30, was given ten additional days to respond The response was completed on November 13, and the plaintiff moved for leave to file her response, including a memorandum in excess of 15 pages. That motion was denied on November 16. The court sanctioned plaintiff $2,500.00 for seeking leave to file beyond the time allowed by prior court order. He also denied leave to file a memorandum in excess of fifteen pages. In the course of the hearing, counsel for defendants asserted that the memorandum contained material related to exclusive provider selection claim decided by the order of March 7, 1996 and the June 18, 2001 denial of the motion for leave to amend regarding the conduct of the hearing. The court granted the plaintiff 14 days to file a "proper response." Within the 14 days the plaintiff filed her now 15 page memorandum, her response to defendants' statement of facts and her own statement of facts with exhibits. Defendants once again moved to strike, and in an order

dated January 15, 2002 but docketed on January 22, 2002, the court struck plaintiff's submissions. The plaintiff had argued in the memorandum that Roth and his corporation were chosen as the exclusive provider as a means of replacing Padma Rao, an Indian, who was the chair person of the anesthesiology department in contravention of the bylaws and in a discriminatory manner as the vehicle by which Rao and other minorities, including the plaintiff, would be replaced. Although this claim was not decided by the March 7, 1996 order and was within the allegations of the Second Amended Complaint filed thereafter, the court held that the section of the memorandum entitled "THE HOSPITAL VIOLATED ITS BYLAWS IN SETTING UP EVERGREEN" was stricken. Also, because the claim regarding the conduct of the hearing was duplicative of existing Count III, the petitioner also included a section entitled "THE HEARING VIOLATED FUNDAMENTAL FAIRNESS AND THE BYLAWS OF THE HOSPITAL." The court also struck this section. The plaintiff was granted ten days in which to file an amended response. On February 1, 2002, plaintiff filed another memorandum, statement of facts and response to defendants' statement of facts. In their memorandum in support of the motion for summary judgment and their statement of facts, the defendants had contended that they were free of discriminatory conduct towards plaintiff and as proof asserted that the process by which Roth and Evergreen were selected was fair and nondiscriminatory. They also argued, as proof of their freedom from discriminatory animus and violations of the bylaws, that the hearing given to the petitioner was performed in a fair manner and in accordance with the bylaws. In response to these arguments, the plaintiff no longer argued that the selection process was actionable as part of an overall scheme to discriminate or that the Hospital was liable for violations of bylaws pertaining to

the manner in which the hearing was conducted. However, in response to the defendants' contentions regarding the fairness of both processes, the petitioner pointed to the evidence demonstrating that they were in fact unfair and discriminatory.

Once again, defendants moved to strike. On February 19, 2002, the court ordered that "defendant shall proffer their reply, on the merits, to the motion for summary judgment by 3/04/02 if the motion to strike is not fully granted." On February 25, the court ruled that "Defendant's motion to strike plaintiff's response brief is granted with full opinion to follow. Defendants are not required to file a reply brief." No response to plaintiff's statement of facts was filed by defendants on or before March 4, 2002 or thereafter.[2] In an order dated March 28, 2002, the court granted defendants' motion to strike the plaintiff's statement of facts and response to defendant's statement of facts and also granted their motion for summary judgment.

On April 29, 2002, the plaintiff filed a timely notice of appeal. The Seventh Circuit Court of Appeals issued its opinion on March 25, 2003 and on April 22, 2003, denied petitioner's petition for rehearing.

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## REASONS FOR GRANTING WRIT

This case involves a significant issue of law which has not been decided by this court , one that involves the inherent supervisory power of this court to ensure that

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[2] Under Local Rule 56.1(a)(3(B), all facts stated in plaintiff's section (b)(3)(B) statement of facts would be deemed to be admitted by the defendants.

local rules are applied in a manner consistent with the principles of "right and justice." It is also one that involves a conflict in the decisions of the various circuits on the same subject. It deals with the authority of the District Court to disregard evidence submitted in opposition to a motion for summary judgment by citation to the local rule governing submissions made in connection with such motions and the review of the exercise of such authority by the Court of Appeals. It raises the issue of whether these practices violate the policy behind the Federal Rules of Civil Procedure generally and Rule 56 in particular.

Rule 1 of the Federal Rules of Civil Procedure states that the rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." As was held in *Foman v. Davis* , 371 U.S. 178, 181 (1962) "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits,' *Conley v. Gibson*, 355 U.S. 41, 48"

The Federal Rules of Civil Procedure recognize that summary judgment is not a substitute for a trial on the merits when there is a genuine dispute. Rule 56(c) authorizes summary judgments only if there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As was stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), speaking of Rule 56:

> It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

More recently, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this court reversed a judgment n.o.v. in favor of the defendant, stating

> In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." Matsushita *Elec. Industrial Co. v. Zenith Radio Corp*, 475 U.S. 5644, 587 (1986) . And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc..*, 477 U.S. 242, 250-251 (1986); see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

However, as Local Rule 56.1 of the Northern District of Illinois is applied, all of the evidence, as in this case, is not considered by the District Court nor is it considered by the Seventh Circuit Court of Appeals after the grant of summary judgment under its standard of review. The Court of Appeals posits that the district court judge has total authority to interpret Local Rule 56.1 as he sees fit and to apply it either "strictly" or otherwise, *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990);

*Bordelon v. Chicago School Bd., of Trustees* , 233 F.3d 524, 527-28 (7th Cir. 2000). "Strict" interpretation means that if the non-moving party's response is not in all respects in "strict " compliance with the rule, the court may strike the entire response and thus not consider any facts asserted by the non-moving party. Or the District Court may strike the portions not in compliance with the rule and decide the motion based on the record thus established. The result is that two brands of justice are dispensed in the Northern District of Illinois..

In one type, the District Court reviews the entire record to see if there is a genuine issue of fact as specified by Federal Rule of Civil Procedure Rule 56 (c) after striking those portions of the response to the motion which are not in conformity with Local Rule 56.1, see e.g., *Mingo v. Roadway Express, Inc.*, 135 F. Supp.2d 884, 893 (N.D. Ill. 2001) and *Teall v. City of Chicago,* 986 F. Supp. 1098, 1100-1101 (1997). After such a decision of the District Court, the Circuit Court of Appeals reviews the decision with regard to the stricken portions, that which the trial court has found not to be in conformance with L.R. 56.1, to determine if the trial court's rulings constituted an abuse of discretion, and thereafter, with respect to the summary judgment, *de novo*, looking at all the evidence which was and should have been considered. The Court of Appeals can do this because it knows precisely what the court held was stricken and what was not.

Then there is "Brand X" as was dispensed in this case. The District Court strikes the entire response under the "strict" enforcement approach on the ground that there was something wrong with some part of the response, thereby at least potentially throwing the baby out with the bath water. The court then proceeds with the motion for summary judgment as if no response existed. In doing so,

the court need not elaborate on what precise fact or item of evidence is in conflict with the local rule.

In the instant case, pursuant to Local Rule 56.1 , the petitioner, as the nonmoving party filed a response to each numbered paragraph in the moving party's statement, including specific references to the affidavits, parts of the record, and other supporting material relied upon. and a statement consisting of additional facts that required denial of summary judgment, including references to the affidavits, parts of the record and other supporting material. She also filed a memorandum in opposition to the motion. The District Court stated that "The court strikes Vakharia's responsive pleadings under Federal Rule of Civil Procedure 12(f) for the defects set forth by the court, and additionally the court looks at the submissions and their faults as a whole in making its determination to strike Vakharia's faulty pleadings."[3] The court also declared, "The content of Vakharia's responsive pleadings fails to comply with Local Rule 56.1."(p. 6) In so doing, he quoted from *Brasic v. Heinemanns's Inc,* , 121 F.3d 281, 285 (7th Cir. 1997) that Local Rule 56.1 that requires "*specific* references to affidavits and parts of the record, not to entire affidavits." (emphasis in original) The court explained that "Vakharia repeatedly cites her own self-serving letters and affidavits for support of her claims rather than making 'specific references to the affidavits, parts of the record and other supporting materials relied upon in her responsive pleadings, Local Rule 56.1 (b)(3)(A). Vakharia makes reference to exhibits and

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[3] As set forth in 3 *Moore's Federal Practice 3rd Ed.* Section 12.10 (13) memoranda and statement of facts submittted in connection with a motion for summary judgment are not "pleadings", and Rule 12(f) has no application to them; *Equal Employment Opportunity Commission v. Admiral Maintenance Service*, 174 F.R.D. 643, 646 (N.D. Ill. 1997).

affidavits generally, some of which contain numerous pages." (pp. 6-7).

In plaintiff's statement of facts, there were no less than *65* citations to specific paragraphs in the affidavits submitted by the plaintiff. In *not* one instance had plaintiff failed to cite to a specific paragraph. None of plaintiff's letters, one or two page affairs, were cited for the truth of the statements made therein but only that they were sent. The movant cited most of the same letters in the same fashion. Every citation to other exhibits was to specific exhibits.

It is true that the petitioner did cite her own affidavits and letters, and being offered as petitioner's evidence, by definition, they would have been self-serving. To treat them as less deserving of consideration because the affidavits or documents are of a party, however, is a total and complete violation of this court's injunction not to engage in credibility determinations or the weight to be given to particular evidence contrary to *Anderson v. Liberty Lobby, Id.*

The District Court also held that the petitioner had filed her last response out of time because the order granting ten days was signed on January 15, but the response was filed on February 1. The order granting that period of time was docketed on January 22 and received by mail on January 24. Under Federal Rule of Civil Procedure 6(a) the petitioner's response was timely even if the date the order was docketed and mailed is not considered, which it must, United *States v. Martinez,* 748 F.2d 623, 625 (11th Cir. 1985) . On appeal, appellant admitted on appeal that the response was timely filed. Having stricken the entire response, the District Court then ruled in favor of the movant, stating, "the court deems

admitted all statements of fact that Defendants present and support with admissible evidence." (p. 9).

On appeal, the Seventh Circuit Court reviews the court's decision to strike the entire submission for "an abuse of discretion.," *Bordelon v. Chicago Sch. Reform Bd of Trustees*, 233 F.3d 524, 528 (7th Cir. 2000) This approach means that the court will search the record, not for evidence demonstrating whether a genuine issue of fact exists, but whether there is anything which could justify the court's decision if the trial court's reasons were nonexistent . The Court of Appeals stated "Vakharia's brief failed to specify any admissible evidence. Despite the district court's repeated requests that Vakharia support her contentions with reference to evidence, she did not." Under Local Rule 56.1, there is no requirement that the memorandum have any specific content. More precisely, under Rule 56.1, the references to evidence are to be in the statements of fact, not the memorandum. The petitioner did support all paragraphs of her statements of fact with citations to the exhibits, affidavits and deposition testimony. In her memorandum, she did cite paragraphs in the statement of facts in her memorandum but not the exhibits underlying them. It has been held that inclusion of citations to the evidence in one's memorandum as opposed to citation to the statement of facts is an "indiscretion" *Teall v. City of Chicago*, 986 F. Supp. 1098, 1101 (N.D. Ill, 1997)

The petitioner pointed out the errors described above in the District Court opinion in the Court of Appeals. The Circuit Court must have understood that, quite literally, the plaintiff did no less than 65 times what the District Court said that she did not do. However, free, even compelled, to search the record for anything which might

justify the District Court's decision, even if the District Court did not rely upon it, the court then held

> Rule 56 (e) of the Federal Rules of Civil Procedure requires that affidavits offered in opposition to summary judgment "be made on personal knowledge setting forth such facts as would be admissible to testify to the matters stated therein." While personal knowledge may include inferences and opinions, those inferences must be substantiated by specific facts. *Drake v. 3M*, 134 F.3d 878, 887 (7th Cir. 1998).

There were two affidavits which petitioner submitted, one from Dr. Vakharia and one from Dr. Rao. Vakharia's affidavit had 29 paragraphs and Rao's 74. Which parts of the affidavit or affidavits to which the court had reference is unknown. What is known is that the court not only affirmed the striking of both affidavits entirely but all other 118 exhibits offered in opposition to the motion itself as well. In that respect the Seventh Circuit itself has held that the evidence need not be admissible in the form in which it is submitted as long as it is the type of evidence which is admissible, *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921 (7th Cir. 1994).

The District Court held that the petitioner had failed to identify issues of fact. The petitioner on appeal pointed out that these issues were prominently identified on page 1 of plaintiff's memorandum The Court of Appeals then held that these issues were not "properly" identified because

> Vakharia repeatedly made sweeping references to piles of exhibits and other materials without any specificity (p. 3).

The plaintiff had 183 statement of facts., assuming the court was referring to the statement of facts, and which of those the court deemed to contain "sweeping references" is not known. Having stricken all of the petitioner's evidence the Court of Appeals reached its conclusions on the basis of defendants' submissions alone.

Under the "strict interpretation- abuse of discretion" approach, since the nonmoving party cannot foresee in advance of a ruling what evidence the court will hold as inadmissible, he may lose whichever way he turns. He either foregoes submitting evidence and loses because he has not produced contrary evidence or he submits it and loses everything because the court found that some part of his evidence as inadmissible. On appeal, even if the District Court's rationale is not supportable such as in this case, the Court of Appeals can search for something else, *Anderson v. U.S.F. Logistics* , 274 F.2d 470, 478 (7th Cir. 2001). This combination permits ,if not encourages. results as here where the trial court did not give the submissions sufficient attention to note that, in no less than sixty-five instances, what he said did not exist in fact did.[4]

In recognition of the policy behind the Federal Rules of Civil Procedure and this court's opinions cited above, the Seventh Circuit has declared that it "will not affirm summary judgment in an employment discrimination case unless the employer would be entitled to a directed verdict if the record at trial were identical to that compiled on summary judgment," *Russell v. Acme-Evans Co.*, 51 F.3d 64. 70 (7th Cir. 1995) *Robinson v. PPG Industries, Inc*, 23 F.3d 1159, 1162 (7th Cir. 1994). However, by reason of

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[4] The only factual statements which were missing citations to exihibits were a few of the defendants.

Local Rule 56.1 the record on summary judgment, not only in this case, but by and large in many others, will not be the same as if the cases had gone to trial. At trial, if the plaintiff offers inadmissible evidence, the court will sustain the objection to it or deny the admission into evidence of an exhibit. As Local Rule 56.1 is interpreted, if the non-moving party offers such evidence or asks the court to consider an inadmissible exhibit, then he risks having his entire evidence stricken and disregarded. The rationale behind the *de novo* review is to ensure that a person's right to have his or her case decided by a trier of fact, particularly a jury, is preserved from possible error on a ruling on the motion in the trial court . Instead, the approach is to find a rationale for sustaining such a decision even if there actually is a genuine issue of fact Summary judgments on this basis are perhaps more often decided in this fashion than on the merits, see e.g. cases cited in *Waldridge*. v. *American Hoechst Corp..*, 24 F. 3d 918, 922 (7th Cir. 1994)

Although it may not be so expressed, to apply Local Rule 56.1 and review such rulings in this fashion is tantamount to granting and affirming a motion for summary judgment as a penalty. Deference to a district court's interpretation of the rule leads to absurd results . Although there is nothing in the rule regarding the content of the memorandum, the District Court--citing the local rule and having dispensed with a hearing as stated in Federal Rule 56 (c)---struck the memorandum because he found the use of case law was not accompanied by analysis as to how it should be applied in this instance."[5] The

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[5]"She fails to provide the court with any guidance, for example, as to how the theories of Justice Learned Hand, might be applicable to the facts in this case" (P. 7) If the court found something hard to understand, it does not warrant striking the memorandum, as opposed to hearing the parties and posing questions.

Court of Appeals also criticized the plaintiff's "brief" on the same basis. The courts' decisions are contrary to where other courts have said is the appropriate place for evidence citations, not to mention the local rule itself

"Strict" application means that even if the District Court sees a genuine issue of fact , if it is not presented in proper form in the statement of facts, it is free to disregard it. Thus, for example, if there is contradictory evidence to the motion for summary judgment in affidavits filed in opposition to a motion, that evidence may disregarded in the absence of a statement of facts or a response to its statement of facts which conforms to Local Rule 56.1 *Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 525, 529 (7th Cir. 2000); *Bradley v .Work*, 154 F. 3d 704, 708 (7th Cir. 1998). At least one Seventh Circuit opinion has frankly admitted that this is a penalty approach. *Smith on behalf of Smith v. Severn*, 129 F.3d 419, 425-26 (7th Cir. 1997). With respect to the non-moving party's failure to file a response to the moving party's statement of facts, the court stated,

> As a penalty, the court will depart from [its] usual posture of construing all facts in favor of the non-moving party.' (citation). Instead, the court will refuse to consider any facts contradicting the 12(M) statement as not properly before it and will view the 12(M) statement and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, (citation). In other words, Rule 12 (N) penalizes the nonmoving party by limiting the scope of facts by limiting the scope of facts a court may take into account in determining whether a genuine issue of material fact exists and

whether the moving party is entitled to judgment as a matter of law .[6]

In other jurisdictions, it has been held that a summary judgment cannot be granted because the opposing party violated the local rule. *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995); *John v. State of LA (Bd of T, For State C. & U.* 757 F.2d 698, 707 (5th Cir. 1985); *Stough v. Mayville Community Schools*, 138 F.3d 612, 615 (6th Cir. 1998) See also *United States v. Lowery,* 166 F.3d 1119, 1125 (11th Cir. 1999). As such, there is a conflict between the Seventh Circuit and other circuits on this issue. It is also submitted that there is a conflict between the Northern District-Seventh Circuit approach and the policy behind the Federal Rules of Civil Procedure and Rule 56 itself.

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## CONCLUSION

Wherefore, Petitioner, Usha Vakharia, M.D., respectfully requests this Court to grant the writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted

JOHN F. O'MEARA
1737 North Wolcott Avenue
Chicago, Illinois 60622-1350
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[6] Rule 56.1 was formerly designated Rule 12

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 24, 2003
Decided March 25, 2003

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 02-2063, 02-3937

Usha Vakharia, M.D.
*Plaintiff-Appellant*,

v.

Little Company of Mary Hospital and Health Care Centers, David J. Roth, M.D., Chidambaram Srinivasan, M.D., et. al.,
*Defendants-Appellees*.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 94 C 5599

Charles R. Norgle, Sr., *Judge*.

## ORDER

Usha Vakharia filed suit against an estimated 500 defendants on September 13, 1994, claiming racial discrimination, antitrust violations, breach of contract, and violations of staff bylaws. After the lawsuit languished in the district court for over eight years, the district court granted the defendant's motion for summary judgment on all counts. Vakharia appeals, challenging various procedural rulings by the district court. We affirm.

## BACKGROUND

Usha Vakharia, M.D., worked as an anesthesiologist at the Little Company of Mary Hospital ("Hospital"). Approximately one year after Vakharia had formally finished the application process, the Hospital selected Evergreen Anesthesia & Pain Management Services ("Evergreen") as the exclusive provider for anesthesiology services. The agreement provided that anesthesiologists not affiliated with Evergreen were not allowed to work at the Hospital. Evergreen offered employment to Vakharia with the right to continue to utilize her privileges at the Hospital. Vakharia declined the offer, and was denied access to the Hospital's anesthesia and operating suites.

Vakharia sought an ad hoc hearing, as provided for under the Hospital bylaws. Following the hearing, the committee of the Hospital's Board of Trustees made certain findings of fact, including, *inter alia*, that: Vakharia was offered a contract to join Evergreen, but did not accept the offer and made no counter proposal to join Evergreen; and there was no evidence of any discrimination on the part of the Hospital or Evergreen. Vakharia was not convinced and filed suit.

While the procedural aspects of this case are long and varied, we highlight only those parts pertinent to our analysis. After filing her original complaint on September 13, 1994, Vakharia filed her first amended complaint. On March 7, 1996, the court granted the Hospital's motion to dismiss all counts, because of procedural defect and for failure to comply with Federal Rule of Civil Procedure 8. In addition, the court, per Rule 11, sanctioned Vakharia in the amount of $14,135.40. After her second amended complaint met a similar fate, Vakharia moved to file a third amended complaint on April 13, 1999. The district court denied her leave to file the proposed third amended complaint because of futility and delay. Vakharia tried again but without success.

On August 15, 2001, the Hospital moved for summary judgment.

Vakharia failed to meet three court ordered deadlines for responding to the motion for summary judgment. The district court gave Vakharia additional opportunities to file her response, but was met with delays and obstruction. Vakharia's responses ignored both the district court's instructions and the rules governing summary judgment motions. A few examples of Vakharia's conduct included arguments made without citation to evidence, failure to correct deficiencies, and refusal to make necessary changes on her 12(N) Statement, as repeatedly requested by the district court.

Finally, on March 28, 2002, the district court granted the Hospital's motion for summary judgment on all counts. Vakharia appeals, arguing the court improperly struck her response to the Hospital's summary judgment motion, improperly denied her leave to file an amended complaint,

and erroneously granted summary judgment in favor of the Hospital.

## ANALYSIS

### A. *Striking Vakharia's Response to Summary Judgment*

The district court struck Vakharia's response to the Hospital's motion for summary judgment in part because it failed to comply with Local Rule 56.1.[1] We have consistently upheld a district court's discretion to require strict compliance with its local rules governing summary judgment. *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 527 (7th Cir. 2000). We review a district court's application of a local rule under an abuse of discretion standard. *Borcky v. Maytag Corp.*, 248 F.3d 691, 697 (7th Cir. 2001).

The basis for the district court's decision was not limited to an isolated incident. Instead, the district court based its ruling on Vakharia's failure to comply with Local Rule 56.1, her continual disregard of the court's previous orders and requests, and her repeated failure to comply with the court's deadlines. After the court had given Vakharia two additional chances, the court found it "inexcusable" for Vakharia to submit, for the third time, pleadings that did not comply with the rules. We agree.

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[1] Local Rule 56.1 provides, in part: "[e]ach party opposing a motion filed pursuant to Fed.R.Civ.P. 56 shall serve and file (1) and opposing affidavits and other materials referred to in Fed.R.Civ.P. 56(e); (2) a supporting memorandum of law; and (3) a concise response to the movant's statement that shall contain: a response to each nmbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting maerials relied upon ...."

Vakharia argues that the district court ignored issues prominently identified in her pleadings. This arguments reveals a failure to comprehend the essence of the district court's ruling. There was no issue properly identified by Vakharia. Vakharia repeatedly made sweeping references to piles of exhibits and other materials without any specificity. Moreover, her inferences and conclusion were without factual support in the record. The district court has no obligations to research and construct the legal argument on to the parties. *Brasic v. Heinemann's Inc.*, 121 F.3d 281, 285 (7th Cir. 1997). Vakharia had eight years to present a claim that passed muster and she failed to do so.

The district court repeatedly gave Vakharia additional changes to abide by the rules. Vakharia ignored the court's admonishments and cannot now claim that the court treated her unfairly after impatiently tolerated her disregard of its orders. For these reasons, we find that the district court did not abuse its discretion when it struck Vakharia's response to the Hospital's motion for summary judgment.

B. *Denying Vakharia Leave t o File an Amended Complaint*

While leave to amend one's pleadings is freely given when justice so requires, we have held that such leave can be legitimately denied where an amendment would be futile. *McGee v. Kerr-Hickman Chrysler Plymouth*, 93 F.3d 380, 385 (7th Cir. 1996). A court may find a proposed amendment is futile if it provides facts or legal theories that are redundant, immaterial, or unresponsive. *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 850 (7th Cir. 2002). we review this determination for an

abuse of discretion. *Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 793 (7th Cir. 1999).

On April 13, 1999, Vakharia sought leave to amend her complaint to add a count alleging that various defendants breached the Hospital bylaws forbidding racial discrimination. The district court denied Vakharia leave to amend because of the delay in seeking the amendment and because the amendment would have been futile. The district court was correct on both counts. The amendment was futile and it was clearly improper to reargue this claim that late in the proceedings. Moreover, Vakharia offers no cogent reason why the court erred. She claims that the original complaint "demonstrated that it was the 'as needed' character of the contract offered which led to her rejection." Her attempt to claim discrimination to explain an outcome that was of her own making reveals the weakness in her argument. Moreover, the amendment was plainly duplicative of an earlier discrimination claim she had raised and the district court rejected. Thus, it did not abuse its discretion in denying Vakharia leave to file the amended complaint.

C. *Granting summary Judgment for the Hospital*

We review a district court's grant of summary judgment *de novo*, viewing all facts and drawing all reasonable inferences in the non-moving party's favor. *Rivera v. Grossinger Autoplex*, 274 F.3d 1118, 1121 (7th Cir. 2001). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 808 (7th Cir. 2001).

The district court granted summary judgment on Vakharia's only remaining claim - discrimination, encapsulated in Counts I and III. Vakharia argues that there was no evidence upon which to grant summary judgment. Vakharia is incorrect. There was no evidence upon which the court could have denied summary judgment.

Rule 56(e) of the Federal Rules of Civil Procedure requires that affidavits offered in opposition to summary judgment "be made on personal knowledge ... setting forth such facts as would be admissible in evidence, and ... showing affirmatively that the affiant is competent to testify to the matters stated therein." While personal knowledge may include inference and opinions, those inferences must be substantiated by specific facts. *Drake v. 3M*, 134 F.3d 878,887 (7th Cir. 1998). Vakharia's brief failed to specify any admissible evidence. Despite the district court's repeated requests that Vakharia support her contentions with references to evidence, she did not. Neither the district court nor the Hospital had any obligation to hunt through her filings to find the disputed factual issues. *See Greer v. Bd. of Educ.*, 267 F.3d 723, 727 (7th Cir. 2001). Vakharia "must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial." *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994). She did not.

The Hospital laid out in intricate detail how Vakharia was solely to blame for the delay of the application. Despite her delay, the Hospital bent over backwards to provide her with substantial work, even ignoring her past professional problems. Her argument that the delay in the processing of her application constituted an adverse employment action is legally and factually groundless.

Thus, the district court correctly determined her claim for relief under § 1981 failed.

Finally, the district court correctly entered summary judgment on Count III. Vakharia asserted that the Hospital's bylaws were breached, yet offered no basis to support it. Vakharia pointed to no evidence that any bylaw was breached and was unable to identify a single provision that was violated.

## CONCLUSION

We have considered all of the Vakharia's remaining contentions, but find none that requires comment.

For the foregoing reasons, we AFFIRM the district court's judgment.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| USHA VAKHARIA, M.D. | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | No. 94 C 5599 |
| v. | ) | |
| | ) | HONORABLE CHARLES |
| | ) | R. NORGLE |
| LITTLE COMPANY OF MARY HOSPITAL and HEALTH CARE CENTERS; EVERGREEN ANESTHESIA & PAIN MANAGEMENT SERVICES, S.C.; DAVID ROTH M.D.; SISTER KATHLEEN McINTYRE; CLAUS VonZYCLIN;and the HOSPITAL BOARD of DIRECTORS | ) | |
| | ) | |
| Defendants. | ) | |

**Charles R. Norgle Sr., District Court Judge**

**OPINION AND ORDER**

Before the court is Defendants' motion to strike Plaintiff's responsive pleadings to Defendants' motion for summary judgment and Defendants' motion for summary

judgment. For the following reasons, Defendants' motions are granted.

## I. BACKGROUND

Plaintiff's attempts to sue the remaining twenty Defendants have taken a long and tumultuous ride over the past eight years. The court provides a brief recitation of the facts that precipitated the filing of this suit and its horrid procedural background.

### A. Factual Background

Plaintiff, Usha Vakharia ("Vakharia"), is a medical doctor practicing since 1974. She is licensed to practice in Illinois and is Board certified in anesthesiology.

On February 20, 1992, Vakharia applied for a position in both the Obstetrical/Gynecological ("OB/GYN") and Surgical sections of the Little Company of Mary Hospital and Health Care Center's ("Hospital") anesthesiology department, through a pre-application process. The Hospital determines its need for physicians and then screens potential applicants through a pre-application process. After the pre-application process, the Hospital provides applications. The Hospital Board regulates credentialing, and the Professional Staff regulates privileges under the Professional Staff Bylaws ("Bylaws").

On March 9, 1992, the Hospital granted Vakharia interim privileges in the OB/GYN section on an as-needed basis and provided her with a copy of the Bylaws the Department Rules and Regulations ("Rules"). Hospital anesthesiologists were engaged in an employment relationship with the Hospital, and entered contracts with

individual patients assigned to the anesthesiologists by the Hospital.

On March 20, 1992, the Hospital provided Vakharia a formal application to obtain full privileges. Vakharia was expected to return the application as quickly as possible, but she did not return the application. So, on June 11, 1992, the Hospital requested that she return her completed application promptly. On August 1, 1992, Vakharia returned her application, but failed to provide the required professional history and the employment history from her previous employer, Swedish Covenant Hospital ("SCH"). Prior to working for the Hospital, Vakharia's privileges at SCH were suspended for serious deficiencies in her care that resulted in injury to her patients. *See Vakharia, M.D. v. Swedish Covenant Hsp.*, 987 F.Supp. 633 (N.D.Ill. 1997).

In January 1993, ten months after receiving the formal application, Vakharia finally provided the Hospital with the information necessary to process her application. Vakharia's application met with the full approval of all the committees and boards to which it was presented. On July 6, 1993, Vakharia was granted full privileges at the Hospital. The granting of full privileges only changed Vakharia's status, not her work schedule at the Hospital. Vakharia was still retained on an as-needed basis. Neither Vakharia's privileges nor her duties were reduced in any way as a result of the delay in the completion and processing of Vakharia's application.

In February of 1994, in an effort to better service its patients Hospital selected Evergreen Anesthesia & Pain Management Services, S.C. ("Evergreen") as an exclusive provider for anesthesiology services. As a result of the exclusive provider agreement between Evergreen and the

Hospital, anesthesiologists not affiliated with Evergreen were not allowed to work at the hospital.

However, Evergreen offered Vakharia the opportunity to join their group and continue working at the Hospital under the same terms and conditions as her direct employment with the Hospital. Vakharia refused Evergreen's offer. Because of Vakharia's refusal to join Evergreen and Evergreen's exclusive contract with the Hospital, Vakharia did not have access to the Hospital's anesthesia equipment and operating suites. Vakharia asserts that the extended period of time in which it took her to complete and the Hospital to process her application, and the impact of selecting Evergreen as the exclusive provider of anesthesiology services for the Hospital, and not being allowed to provide anesthesiology services at the hospital, form the basis for her suit. Defendants have filed a motion for summary judgment.

**B. Procedural Background**

Vakharia filed her original complaint on September 9, 1994, almost eight years ago. Vakharia in an attempt to state a viable cause of action has amended her original complaint several times. At one point Plaintiff threw everything but the proverbial kitchen sink in the Amended Compliant ("Complaint") naming an estimated 500 Defendants in 178 paragraphs spread over fifty-one pages. The Complaint struggled to allege simple discrimination, antitrust, and breach of contract and bylaws claims. After lengthy oral arguments and a lengthy opinion by the court, Plaintiff's claims have been whittled down to only two counts against approximately twenty defendants. *See Vakharia v. Little Co. of Mary Hosp.*, 917 F.Supp. 1282 (N.D.Ill. 1996).

The two counts that remain are Count I, and Count III. Count I alleges a delay in the processing of Plaintiff's application for hospital staffing privileges in violation of 42 U.S.C. § 1981 against the Hospital, Evergreen, David Roth M.D., Sister Kathleen McIntyre, Claus VonZyclin, and each member of the Hospital Board of Directors. Count III alleges the Hospital violated the Bylaws by: (1) failing to place Plaintiff on full rotation; and (2) not allowing Plaintiff to provide anesthesia services at the Hospital as a result of her refusal to join Evergreen. Defendant has filed a motion for summary judgment on the remaining two claims and Vakharia has attempted to file a response. To get to this point in the litigation has been anything but easy. But unlike Sisyphus, Vakharia has not even pushed her stone near the top of the hill before it falls down again.

There have been numerous attempts to amend the complaint, motions to strike, motions to dismiss, motions for extensions of time, and various other matters that have all been fully briefed and determined by this court. Vakharia have been repeatedly admonished and sanctioned throughout the entirety of the case of her lack of due diligence, failure to comply with Local Rules, failure to timely file motions, and failure to comply with the court's orders. (*See* Minute Order of October 28, 1994, requiring Vakharia to post a $10,000.00 discovery bond); (*See* Minute Order of November 7, 1996, granting Defendants' motion for Rule 11 sanction in the amount of $14,135.40); and (*See* Minute Order of November 16, 2001, granting Defendants' motion for sanctions in the amount of $2,500.00.) Vakharia has repeatedly been admonished by the court for her filing of numerous motions for extensions of time and for her repeatedly filing briefs outside the original time periods set forth by the court, without requesting an extension of time.

Vakharia's attempts to respond to Defendant's motion for summary judgment have been unsuccessful. Vakharia's first attempt to respond to Defendants' motion for summary judgment failed to comply with Local Rule 56.1 and the court's previous orders. In an effort to help Vakharia file an appropriate response, Defendants, as well as the court, outlined the problems and defects of Vakharia's response during oral arguments. Vakharia's response was lacking in both form and substance. Vakharia attempted to reargue issues that had previously been excluded by the court in its opinion and order entered March 7, 1996, a Minute Order entered on June 18, 2001, and again in open court on November 16, 2001. Additionally, Vakharia made incoherent conclusions and assertions without any factual basis or legal citation.

Defendants brought a motion to strike Vakharia's entire responsive pleading and for sanctions. The court granted Defendant's motion to strike, sanctioned Vakharia $2,5000.00, but allowed her another opportunity to correct the deficiencies in her response. (*See* Minute Order of November 16, 2001.) The court noted that to end Vakharia's ability to respond to the motion for summary judgment would be draconian at this time. (*See* November 16, 2001, Transcript of Proceedings at p. 15.) The court ordered Vakharia to correct the defects and comply with the local rules and the previous orders of the court. (*See* Minute Order of November 16, 2001.) Finally, the court warned Vakharia that "if you do not comply with this order, the Court will not impose a monetary sanction, it will be to rule on the motion without the benefit of any response by the Plaintiff." (*See* November 16, 2001, Transcript of Proceedings at p. 15.)

Vakharia's second attempt at responding to Defendants' motion for summary judgment was rife with the same defects as her previous attempts. Vakharia did alter the physical form of her response in an attempt to comply with Local Rule 56.1. The substance, on the other hand, was still completely lacking compliance with Local Rule 56.1 and the court's previous orders. Vakharia's response was again full of factual and legal conclusions without any supporting citations. Vakharia again attempted to argue issues previously excluded by this court. Rather than attempting to reply to Vakharia's response Defendants again filed a motion to strike the response for filing to comply with the Local Rules and the court's direct orders. Defendants asked that Vakharia be barred from attempting to respond to the motion for summary judgment for a third time as the court had previously stated that on November 16, 2001. (*See* Defs.' Second Mot. to Strike Pls. Resp.) The court again struck Vakharia's response to Defendants' motion for summary judgment. (*See* Minute Order of January 15, 2002.) Despite the court's previous warnings, Vakharia was again given the opportunity to conform her response to the Local Rules and the court's previous orders. Vakharia was given an additional ten days to file her amended response.

Seventeen days after the court struck Vakharia's amended response, Vakharia submitted an amended response to Defendants' motion for summary judgment. It is important to note that Vakharia did not ask leave of court for an extension of time in which to file her amended response. Defendants have for the third time filed a motion to strike Vakharia's response for failure to comply with Local Rules and the court's previous orders.

## II. DISCUSSION

Presently before the court is Vakharia's third attempt at responding to Defendant's motion for summary judgment and Hospital's motion that it should be stricken. As discussed below the court, for the third and final time, strikes Vakharia's responsive pleadings, for failing to comply with Local Rule 56.1, the court's previous rulings, and as untimely.

"[I]t is not the district court's task to scour the record in search of a genuine issue of triable fact because court relies on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Brasic v. Heinemann's Inc.*, 121 F.3d 281, 285 (7th Cir. 1997) (LR 56.1 requires "*specific* references to affidavits and parts of the record, not to entire affidavits") (emphasis in original). Furthermore, "it is not the role of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel." *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996); *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cr. 1986); *see Keller v. United States*, 58 F.3d 1194, 1196 n.3 (7th Cir. 1995); *Salazar v. City of Chicago*, 940 F.2d 233, 242-43 (7th Cir. 1991). "[A] lawsuit is not a game of hide the peanut." *See Greer v. Board of Educ. of the City of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001) (citation omitted).

The content of Vakharia's responsive pleadings fails to comply with Local Rule 56.1. Vakharia's memorandum in response to Defendant's motion for summary judgment is replete with legal and factual conclusions without any basis to support them. Vakharia repeatedly cites her own

self serving letters and affidavits for support of her claims rather than making "specific references to the affidavits, parts of the record, and other supporting materials relied upon," in her responsive pleadings. Local Rule 56.1(b)(3)(A). Vakharia makes references to exhibits and affidavits generally, some of which contain numerous pages. Vakharia's only use of case law is to state well settled law without going into any analysis as to how they should be applied in this instance. (*See* Pl's Resp. Br.) She fails to provide the court with any guidance, for example as to how the theories of Justice Learned Hand, might be applicable to the facts in this case. (Pl's. Resp. Br. p. 6)

Vakharia's responsive pleadings also fail to comply with the court's previous rulings. On two previous occasions the court addressed Vakharia's claim regarding the formation of Evergreen. (*See* Opinion and Order entered March 7, 1999 and Minute Order entered June 18, 2001.) The court dismissed Vakharia's claims on that matter. Additionally, the court identified the sections of Vakharia's response, when striking Vakharia's two previous responses, that should be stricken due because the court had already decided those issues regarding Evergreen. (*See* Minute Order of November 16, 2001 and Minute Order of January 15, 2002.) Vakharia has once again disregarded the court's previous orders, and intertwined throughout her response matters pertaining the formation of Evergreen. Vakharia's flagrant disregard for the court's previous orders is yet another reason to strike her responsive pleadings.

Finally, Vakharia's responsive pleadings are also untimely filed. On January 15, 2002, the court entered a Minute Order striking Vakharia's second attempt at responding to the summary judgment motion. (*See* Minute Order of 1/15/02.) In that minute order, the court gave

Vakharia ten days within which to file her responsive pleadings. (*See* Minute Order 1/15/02.) Vakharia did not file her responsive pleadings or request an extension of time to file her pleadings, within that ten day period. On February 2, 2002, seventeen days after the court entered its order, Vakharia submitted her responsive pleadings without leave of court. The record is replete with late submissions by Vakharia without filing a request for extensions. She has continuously disregarded the court's orders and its deadlines. "One who decided to follow a schedule of his own devising, for reasons of his own invention, has no legitimate complaint when the tribunal adheres to the rules." *White v. Bensten*, 31 F.3d 474, 476 (7th Cir. 1994) (citing *McNeil v. United States*, 508 U.S. 106 (1993); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1983)). The court strikes Vakharia's responsive pleadings under Federal Rules of Civil Procedure 12(f) for the defects set forth by the court, and additionally the court looks at the submissions and their faults as a whole in making its determination to strike Vakharia's faulty responsive pleadings.

The case, which has spanned eight years, has finally come to a point where there is a dispositive motion before the court. Vakharia has not been able to succinctly state and support her remaining claims, but has put forth a menagerie of unfounded, unsupported conclusions, without complying with the Local Rules or this court's orders. After giving Vakharia two additional chances to conform her submissions to the standards set forth in Local Rule 56.1 and the court's previous orders, it is inexcusable for Vakharia to submit, for the third time, pleadings that do not comply with the rules. Vakharia's responsive pleadings to Defendants' motion for summary judgment are stricken. The court will rule on Defendants' motion for

summary judgment without the benefit of a response from Vakharia.

## III. SUMMARY JUDGMENT

Summary judgment is permissible when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). the nonmoving party cannot rest on the pleadings alone, but must identify specific facts, *see Cornfield v. Consolidated High School District No. 230*, 991 F. 2nd 1316, 1320 (7th Cir. 1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Technical Services, Inc.*, 176 F.3d 934, 936 (7th Cir. 1999); *see also Shank v. William R. Hague, Inc.*, 192 F.3d 675, 682 (7th Cir. 1999) (stating that a party opposing summary judgment must present "what evidence it has that would convince a trier of fact to accept its version of events.") A defendant is entitled to put the plaintiff to his proofs and demand a showing of the evidence. *See e.g. Navarro v. Fuji Heavy Industries. Ltd.*, 117 F.3d 1027, 1030 (7th Cir. 1997). If the plaintiff fails to come up with a required proof, the defendant is entitled to summary judgment. *See id.* It bears repeating that the plaintiff must present evidence, rather than speculation and conclusions without factual support. *See Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1146-47 (7th Cir. 1994). "In deciding a motion for summary judgment, the court will conclude that there is no genuine issue as to any proposed fining of fact to which no response is set out." *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997); Fed.R.Civ.P. 56(e); Local Rule 56.1. In deciding this motion for summary judgment Plaintiff's response was stricken, leaving the court to decide the motion based on the pleadings before it. Under Local Rule 56.1, the court deems admitted all statements

of fact that Defendants present and support with admissible evidence.

Count I alleges delay in processing Vakharia's application for hospital staffing privileges violates 42 U.S.C. § 1981. To establish a claim under § 1981 Plaintiff must make a prima facie case showing: (1) she was in a protected group; (2) she was qualified for the position and/or performing according to her employer's expectations; (3) suffered an adverse employment action; and (4) others outside the protected class wee treated differently. *Lalvani v. Cook County*, 269 F.3d 785, 789 (7th Cir. 2001).

Even if, arguendo, Vakharia could satisfy some of the elements necessary to make a prima facie case, she can not show that she suffered any adverse employment action. Vakharia was allowed to continue practicing at the Hospital the entire time she was waiting for her formal application to be processed. Neither her work schedule nor her duties where affected by the delay in processing her application. The evidence also demonstrates that the delay in the processing of Vakharia's application was a result of her own making. Vakharia failed to provide the necessary information needed to complete her formal application in a timely fashion. Once the Hospital was provided with the all the necessary information it processed her application in a quick and expeditious manner. Vakharia has failed to present even a scintilla of evidence that shows a genuine issue of material fact. Vakharia's claim for relief under § 1981 fails.

The court also finds that there is no genuine issue of material fact as to Count III. Vakharia alleges that Defendants violated its Bylaws by failing to place her on full rotation and by not allowing her to provide anesthesia

services at the Hospital after she refused to join Evergreen. Vakharia is unable to identify any provision of the Bylaws where such rights arise. (*See* Defs.' 56.1 Ex. 4, p. 207-208, 211, 213-215). The mere fact that she was granted privileges at the Hospital does not entitle her to work at the Hospital. "[P]rivileges reflect the hospital's decision that a physician is qualified to practice in the facility, but do not in and of themselves confer employment." *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 481 (7th Cir. 1988). "Privileges relate to qualifications, while employment is a matter of contract." *Vakharia v. Swedish Covenant Hosp.*, 987 F. Supp. 633, 646 (N.D.Ill. 1997). The court finds that there is no genuine issue as to Vakharia's claims and grants Defendants' motion for summary judgment.

## IV. CONCLUSION

For the forgoing reasons, Defendants' motion to strike Plaintiff's response brief is granted. Defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is also granted.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR., Judge

Dated: 3/28/02

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

April 22, 2003

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 02-2063, 02-3937

| | |
|---|---|
| Usha Vakharia, M.D.<br>*Plaintiff-Appellant*, | Appeals from the United States District Court for the Northern District of Illinois, Eastern Division |
| v. | |
| | Case No. 94 C 5599 |
| Little Company of Mary Hospital and Health Care Centers, et al.,<br>*Defendants-Appellees*. | Charles R. Norgle, Sr., *Judge*. |

ORDER

On consideration of the petition for rehearing filed in the above-captioned case by the plaintiff-appellant, all of the judges on the original panel have voted to deny. The petition for rehearing is therefore DENIED.

Nos. 02-2063, 02-3937
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

| | |
|---|---|
| USHA VAKHARIA, M.D., Plaintiff-Appellant, | ) |
| vs. | ) On appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 94 C 5599 |
| LITTLE COMPANY OF MARY HOSPITAL & HEALTH CARE CENTERS, DAVID J. ROTH, M.D., EVERGREEN ANESTHESIA & PAIN MANAGEMENT SERVICES, S.C., SISTER KATHLEEN MCINTYRE, CLAUS von ZYCHLIN, and the HOSPITAL BOARD OF DIRECTORS, Defendants-Appellees. | ) The Honorable Charles R. Norgle, Sr. Judge Presiding |

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**PLAINTIFF-APPELLANT USHA VAKHARIA'S PETITION FOR REHEARING**

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## PETITION FOR REHEARING

Appellant Usha Vakharia, M.D., requests the court to grant a rehearing for the following reasons as stated below:

I

## THE COURT HAS FAILED TO RECOGNIZE THAT THE SECOND AMENDED COMPLAINT HAS NOT BEEN DISMISSED

The court's opinion states on page 2 that "On March 7, 1996, the court granted the Hospital's motion to dismiss all counts, because of procedural defects and for failure to comply with Federal Rules of Civil Procedure 8. In addition, the court, per Rule 11, sanctioned Vakharia in the amount of $14,135.40.[2] After her second amended complaint met a similar fate, Vakharia moved to file a third amended complaint."

The plaintiff's Second Amended Complaint did not meet a similar fate. It was filed on July 7, 1997 (Dkt #171). The defendant's motion to strike various portions of this complaint was denied on April 20, 1998 (Dkt # 186). Therefore, it is not true that "Vakharia tried again but without success." It is true that the district court denied the plaintiff's motion to add additional counts to that

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[2]Although the opinion states that the plaintiff filed suit against an estimated 500 individuals, the plaintiff sued the hospital medical staff as an unincorpoated association, which was estimated to have 500 members.(Dkt # 1 and 101). Service was only made on the unincorporated association. None of the 500 members were served as individual members of the medical staff. For naming an unincorporated association, *inter alia,* plaintiff received the sanction of $14,135.40, one large enough , one would think, to expiate any error in naming an improper defendant.

Second Amended Complaint on June 30, 1999 (Dkt #205), but that left the Second Amended Complaint as it was.

This court's opinion hinges on this central fact.

If the plaintiff's Second Amended Complaint is not considered, then one could say that "Vakharia had eight years to present a claim that passed muster and she failed to do so."[3] If the Second Amended Complaint is not considered, indeed '(t)here was no issue properly identified by Vakharia" because there was no complaint on file which could establish issues between the parties. And it could be said that she presented no argument or evidence which was relevant or material to any issue of fact.

However, the admissibility, relevance and materiality of her argument and her exhibits are determined by reference to this Second Amended Complaint. It is hornbook law that a litigant is entitled to prove any and every allegation made in the pleadings, 71 *CJ.Ss.2d* "Pleadings" Sec. 525; *Sampsell v. Anehis,* 108 F.2d 945, 955 (9th Cir. 1940). The principle is so fundamental that it is difficult to find any case in which the court felt the need to restate it in over 60 years. As this court stated on page 5 "Vakharia 'must affirmatively demonstrate by specific factual allegations, that there is a genuine issue of

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[3] As the court noted, the case languished in the district court for eight years. The plaintiff sought discovery on November 17, 1995. (Dkt #111 Ex. A) The court entered an order on December 15, 1995 staying discovery pending the disposition of the defendants' motions to dismiss. (Dkt #112) This is true even though the plaintiff had been ordered to post a discovery bond in October 1994 and had done so. (Dkt #6, 7, pp. 14-15; Dkt #110); Dkt 275 p. 2) The court did not rule on the motions to dismiss until April 1998. (Dkt # 186, 187) In 1999, the plaintiff got discovery for the first time, the same year she offered the amendment,. (Dkt # 194, #195, )

material fact requiring trial.' *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994)."

The Second Amended Complaint was not limited to delay in the processing Dr. Vakharia's privileges. While the court states that "There was no issue properly identified by Vakharia" the plaintiff has pointed out that the motion for summary judgment itself was addressed to only one issue, i.e., whether the defendant delayed in issuing permanent privileges, whereas the second amended complaint also alleged that the defendants acted in a discriminatory manner in issuing interim privileges. Judge Norgle himself had noted in his opinion on March 7, 1996 that plaintiff applied for the full-time position as well as the "as needed" position, 917 F. Supp. at 1293-94.

As alleged in Paragraph 22 of the Second Amended Complaint, plaintiff got full privileges and the right to work full-time but was not allowed a full-time schedule. This allegation was supported, *inter alia*, by Paragraph 141 of Plaintiff's 12N Statement of Facts which referenced the letter of Padma Rao, M.D., Department Chairman, to Martin Phee, chairman of the Credentials Committee explicitly stating that Dr. Vakharia had applied for full-time staff appointment and that no restrictions were placed on her in terms of being "part-time."

The district court did not consider the Second Amended Complaint in reaching its decision (A2-A7). In this court, the appellant in her brief addressed the issue of whether the plaintiff's memorandum and 56.1 statement was relevant and material, particularly to the allegations of Paragraph 29 of Count I and Paragraph 48 of Count III of the Second Amended Complaint and demonstrated how they were (pp. 20-30). The appellees did not respond but rather contented themselves by saying that the appellant

was arguing "previously dismissed claims" without attempting to show how the submissions were not appropriate under the Second Amended Complaint (Aple Br. pp.11-12, 26-30). In the trial court, the defendants made no references and had no exhibits or other materials which in any way dealt with that issue except to say that she was given the position she applied for. As this court has stated, p. 3, "The district court has no obligation to research and construct the legal arguments open to the parties." That would also apply to defendants. Judge Norgle himself did not make such a finding.

The Court's statement that Evergreen offered employment to Vakharia with the right to continue to utilize her privileges at the hospital begs the question of what the effect of granting her the status of provisional associate was and whether the "Back-up" contract offered by Evergreen was consistent with that status. As a provisional associate, she was full-time and was offered only a "Back-up" contract (Aplt Br. 31). Putting aside the effect of granting plaintiff permanent privileges as a provisional associate, the question remains as to the mattter of not considering the plaintiff for the full-time position in surgical anesthesia in the first place. And the "as needed" character of the contract could not have been of "her own making" unless the court accepts the premise that she only applied for the "as needed" position, something which Judge Norgle himself did not find (A2).

There admittedly was no delay in filing any of the memoranda or 56.1 statements after the court struck the plaintiff's first submissions on November 16, 2001 (Aple's Br. p. 22, fn. 22). While this court has said that the plaintiff violated "prior court orders" in submitting her response to the motion for summary judgment, to measure plaintiff's response in light of the order of March 7, 1997 is

not appropriate because of the Second Amended Complaint. It is not obstruction to argue or present evidence which is pertinent to allegations made in the pending complaint.

## II

## THE "PILES OF EXHIBITS" WERE DOCUMENTS WHICH WERE NECESSARY FOR THE COURT TO MAKE A RULING ON ADMISSIBILITY AND A RULING ON ADMISSIBILITY OUGHT NOT BE CONVERTED INTO A LOCAL RULE 56.1 HOLDING

The court has stated that the plaintiff made arguments without citation to evidence. However, all statements of fact were related to specific statements of fact in the 12 N statement and all statements of fact were supported by reference to exhibits. In *Waldridge v. American Hoechst Corp.*, 24 F. 3d 918, 921 (7th Cir. 1994), this court held that the respondent need not tender evidence in a form that would be admissible at trial as long as the evidence is of the kind admissible at trial. The plaintiff's business records would be admissible at trial with authentication, and the fact that an employee of defendant has not acknowleged in an affidavit filed with the motion for summary judgment that they were kept in the ordinary course of business does not mean that they are not of the kind which would be admitted at trial.

The court states that the plaintiff made "sweeping references to piles of exhibits and other materials without any specificity," (p. 3). The references cited by appellees specified as the prime example, a "stack of resumes"

bearing handwritten markings (Aple Br. 24-25)[4] . The appellee contended that in the absence of testimony as to who put the "X" on the "alleged" applications, the documents did not provide factual support for the inference that appellees "weeded out applications from minorities, particularly Indians." However, whether the evidence is admissible is a consideration apart from Local Rule 56.1 and one that can only be decided by a court which has the documents before it. The respondent in her memorandum provided her rationale for the admissibility of the records. (Dkt #256 pp. 5-6). The only way in which the court could make a ruling was to look at the records, whether they collectively could be called "piles" of exhibits or not. To characterize a court's opinion on the admissibility of evidence as a holding that Local Rule 56.1 is thereby violated is to deny the party his or her usual right of offering evidence to the court for its consideration. The court is under an obligaton to construe local rules so that they do not conflict with federal rules, *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir, 1995). Under Federal Rule of Evidence 401, even if evidence is insufficient to prove the ultimate point for which it is offered, the court may not exclude evidence if it has the slightest probative worth, *DSX, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462 (6th Cir. 1996); *Douglas v. Eaton Corporation*, 956 F.2d 1337, 1344 (6th Cir. 1992); Wright & Graham, Jr., *Federal Practice & Procedure*, Sec. 5165 at 49. The court's statement on page 5 that the plaintiff failed to cite to any

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[4]Plaintiff also specified a large document (Ex. 44) on pages 11, 14 of her memorandum (Dkt # 256) , that being the staff bylaws, but she also specified the article and section she relied upon. In Plaintiff's 12N statement, she specified the articles and sections of the Hospital and Medical Staff Bylaws that were violated (Dkt # 257, ¶¶ 89, 96, 97, 119, 133, 137, 160, 176). In Plaintiff's response to Defendant's 12M statement, she specified the article and sections of the bylaws that were violatd (Dkt # 258, pgs. 3, 5, 6, 8, 11-12, 13, 14, 17, 18, 35, 38).

"admissible" evidence raises the spectre of evidentiary rulings now becoming holdings under Local Rule 56.1 and thus a justification for ignoring all of the other evidence offered by the party.

Whenever the appellant cited to an exhibit longer than one or two pages, she designated the document more specifically. For example, at page 14, she cited to Group Exhibit 52, which was a collection of letters, but the memorandum specified that the reference was to a letter of Martin Phee dated May 25, 1994 and specified the sentence in the letter which was of importance.

## CONCLUSION

In light of the foregoing, the plaintiff-appellant Usha Vakharia, M.D., respectfully prays this court to grant a rehearing and to reverse the judgment of the district court and to remand this cause for trial or other proceedings not inconsistent with this court's ruling or for such other and further relief as this court may deem just.

Respectfully submitted,

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## Rules of the District Court
## Northern District of Illinois

**LR 56.1. Motions for Summary Judgment**

(a) MOVING PARTY. With each motion for summary judgment filed pursuant to Fed.R.Civ.P. 56 the moving party shall serve and file --

(1) any affidavits and other materials referred to in Fed.R.Civ.P. 56(e);

(2) a supporting memorandum of law; and

(3) a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law, and that also includes:

(A) a description of the parties, and

(B) all facts supporting venue and jurisdiction in this Court.

The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion.

If additional material facts are submitted by the opposing party pursuant to section (b), the moving party may submit a concise reply in the form prescribed in that section for a response. All material facts set forth in the statement filed pursuant to section (b)(3)(B) will be deemed admitted unless controverted by the statement of the moving party.

(b) OPPOSING PARTY. Each party opposing a motion filed pursuant to Fed.R.Civ.P. 56 shall serve and file --

(1) any opposing affidavits and other materials referred to in Fed.R.Civ.P. 56(e);

(2) a supporting memorandum of law; and

(3) a concise response to the movant's statement that shall contain:

(A) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon; and

(B) a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statements of the opposing party.

(2)

Supreme Court, U.S.
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OCT 14 2003
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No. 03-227

IN THE

# Supreme Court of the United States

USHA VAKHARIA, M.D.,

*Petitioner,*

*v.*

LITTLE COMPANY OF MARY HOSPITAL & HEALTH CARE CENTERS, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Did the Court of Appeals err by holding that the District Court did not abuse its discretion by striking Petitioner's response to a motion for summary judgment due to Petitioner's repeated refusal to comply with Local Rule 56.1 and the District Court's prior orders?

II. Did the Court of Appeals err by holding that the District Court properly granted summary judgment on the remaining record after the District Court struck Petitioner's response for repeated failure to comply with both the District Court's prior orders and Local Rule 56.1?

III. Is there a conflict among the Court of Appeals concerning the Questions Presented?

## CORPORATE DISCLOSURE STATEMENT

Respondent Little Company of Mary Hospital & Health Care Centers furnishes the following information in compliance with Supreme Court Rule 29.6:

(1) Little Company of Mary is a Section 501(c)(3) corporation. Its sole corporate member is The American Province of the Sisters of Little Company of Mary.

(2) There is no parent and no publicly held company owns 10% or more of the corporation's stock.

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The Respondents, Little Company of Mary Hospital and Health Care Centers, *et al.*, (collectively, the "Hospital") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's unpublished order in this case.

## STATEMENT OF THE CASE

The Petition for Certiorari comes before this Court in the final stage of Petitioner Usha Vakharia, M.D.'s nine-year legal odyssey, a journey marked by myriad false starts, wrong turns, and refusals to obey the rules of the road. Despite Dr. Vakharia's reference to *Conley v. Gibson*, 355 U.S. 41 (1957), however, her cause was rejected by both courts below not for "one misstep," 355 U.S. at 48, but rather for an entire marathon of errors.

This case arises out of Respondent Little Company of Mary Hospital and Health Care Centers' relationship with Petitioner Usha Vakharia, M.D. When Dr. Vakharia refused to join an exclusive provider group in the Hospital's Department of Anesthesiology (the "Department"), the Hospital terminated her access to its patients and facilities. Dr. Vakharia subsequently sued the Hospital for race-, gender-, and ethnicity-based employment discrimination, antitrust violations, and breach of contract, among other claims. Having lost before both the District Court and the Court of Appeals, Dr. Vakharia filed her Petition for Writ of Certiorari with this Court.

## A. Background Facts.

The Hospital is a not-for-profit general acute care facility affiliated with the Catholic Church. Located in the Chicago suburb of Evergreen Park, Illinois, the Hospital has served patients of all races, colors, nationalities, and economic means for decades. During Dr. Vakharia's tenure with the Department, a majority of the anesthesiologists were foreign-born and held degrees from medical schools located outside the United States. (Def. 56.1 ¶ 29.)[1]

### 1. Approval of Dr. Vakharia's Application for Medical Privileges.

Dr. Vakharia's association with the Hospital began on February 20, 1992, when she submitted a preliminary application for medical privileges and asked to be assigned work in the Department on an "as-needed" basis. Dr. Vakharia sought privileges at the Hospital because her previous workplace, Swedish Covenant Hospital ("Swedish Covenant") summarily suspended her privileges on July 31, 1989, after an audit conducted by an independent association of anesthesiologists found serious deficiencies in Dr. Vakharia's quality of care. *See also Vakharia v. Swedish Covenant Hospital*, 987 F. Supp. 633 (N.D. Ill. 1997), *aff'd*, 190 F.3d 799 (7th Cir. 1999), *cert. denied,* 530 U.S. 1204 (2000). Dr. David Roth, a Defendant below and Respondent here, was the Chairperson of the Department at the time Dr. Vakharia submitted her application. Dr. Roth was aware

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1. Respondents use "Def. 56.1" to refer to Defendants' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, filed with the District Court below at R. 234. The exhibits attached thereto are referred to as "Def. Ex."

of Dr. Vakharia's status as an Asian Indian, and nevertheless immediately approved Dr. Vakharia's preliminary application. The Hospital granted Dr. Vakharia interim privileges on March 9, 1992, and Dr. Vakharia began working on an as-needed basis shortly thereafter. (Def. 56.1 ¶¶ 30–34.)

A few weeks later, on March 26, 1992, the Hospital gave Dr. Vakharia an application for medical staff privileges. Dr. Vakharia failed to return the application until August 1, 1992, and the materials she submitted did not include required medical references. Meanwhile, Dr. Vakharia impeded the Hospital's ability to verify her employment history by initiating litigation against Swedish Covenant for its release of similar information to another area hospital where Dr. Vakharia had applied for privileges. With critical information unverified, the Hospital was not able to send Dr. Vakharia's application for medical privileges to the Department for its consideration and approval. In the meantime, Dr. Vakharia continued to work on an as-needed basis as she had requested. (Def. 56.1 ¶¶ 35, 37–41.)

Dr. Vakharia did not submit a complete application until January 1993. By that time, Dr. Padma Rao, a female Asian Indian, was the Department Chairperson. In the same month that Dr. Vakharia completed her application, the medical staff office forwarded it to the Department. On March 8, 1993, the Department first considered Dr. Vakharia's application, and on April 8, 1993, the Department approved it. The Department then forwarded Dr. Vakharia's application to the Hospital's Credentials Committee, which approved it on June 21, 1993, and sent it to the Hospital's Executive Committee. On June 24, 1993, the Executive Committee approved Dr. Vakharia's application for anesthesiology privileges, and the Hospital Board approved full medical

privileges for Dr. Vakharia on July 6, 1993. (Def. 56.1 ¶¶ 42–44.) As with all doctors employed by the Hospital, the grant of such privileges did not affect Dr. Vakharia's work schedule; rather, she continued to work on an as-needed basis pursuant to her initial request. (Def. 56.1 ¶¶ 15–15, 25.)

**2. Selection of Evergreen as Exclusive Anesthesia Group Practice.**

Like many hospitals, the Hospital eventually decided to hire an exclusive service provider group to administer and staff the Department of Anesthesiology. Following a lengthy selection process, the Hospital selected Dr. Wilfred K. Boarden, an African-American, as Department Chair and group president for the purposes of organizing such an exclusive group practice. Dr. Boarden, however, declined the offer. The Hospital then turned to Drs. Roth and Chidambaram Srinivasan, a male Asian Indian, to organize and implement the exclusive provider group. Drs. Roth and Srinivasan formed Evergreen Anesthesia & Pain Management Services, S.C., ("Evergreen") which in turn entered into an exclusive contract to provide anesthesia services for the Hospital. (Def. 56.1 ¶¶ 50–51.)

The exclusive contract, like similar contracts in other Hospital Departments, allowed only those anesthesiologists employed by Evergreen to provide services to the Hospital's patients. Evergreen staffed itself by offering employment to all those anesthesiologists with privileges at the Hospital on the same schedule as they previously worked, including Dr. Vakharia. Rather than accept Evergreen's offer, Dr. Vakharia declined the contract. (Def. 56.1 ¶ 51.) As a

result, and pursuant to the terms of the exclusive contract, the Hospital denied Dr. Vakharia access to the Hospital's anesthesia equipment and operating suites. (Def. 56.1 ¶ 52.)

### 3. Dr. Vakharia's Invocation of Administrative Remedies.

Dr. Vakharia sought an administrative hearing under the Hospital's bylaws to challenge the determination that she could no longer work in the Department. During the hearing, Dr. Vakharia failed to identify any provision of the Hospital's bylaws that the Hospital breached by entering into the Evergreen agreement or by subsequently barring Dr. Vakharia from the Hospital after she refused to join Evergreen. (Def. Ex. 4 at 213–218, 221, 225–226, 240–42, 244.)

Following the hearing, the committee of the Hospital's Board of Trustees made certain findings of fact, including, among others, that Dr. Vakharia was offered a contract to join Evergreen, that she did not accept the offer, and that she made no counterproposal to join Evergreen under different terms. Furthermore, the committee found that Dr. Vakharia had presented no evidence of any discrimination on the part of the Hospital or Evergreen. The Hospital's Board of Directors adopted the factual findings and unanimously resolved to terminate Dr. Vakharia's access to the Hospitals' facilities. (Def. Ex. 7.)

## B. The Proceedings Below.

Dr. Vakharia embarked on this legal journey on September 13, 1994, by filing a 178-paragraph complaint in the United States District Court for the Northern District of Illinois, naming an estimated 500 defendants, including the

entire medical staff of the Hospital. (R. 1.)[2] Her complaint attempted to allege discrimination in violation of 42 U.S.C. § 1981 (2003), antitrust conspiracy in violation of the Sherman Act, breach of the medical staff by-laws, and violations of 42 U.S.C. §§ 1985 and 1986 (2003). Dr. Vakharia's apparent thesis was that she was a victim of improper employment discrimination based on her race, ethnicity, and gender.

### 1. Dr. Vakharia's Amended Complaints.

Dr. Vakharia amended her original complaint on June 1, 1995, adding claims under Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and the Age Discrimination in Employment Act. (R. 101.) On March 7, 1996, the District Court granted the Hospital's motion to dismiss on all counts, ruling that the amended complaint suffered from numerous procedural defects and presented a wholesale failure to comply with Rule 8 of the Federal Rules of Civil Procedure. *See Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.*, 917 F. Supp. 1282, 1302–03 (N.D. Ill. 1996). As part of its ruling, the District Court imposed Rule 11 sanctions against Dr. Vakharia in the amount of $14,135.40. (R. 143.)

Dr. Vakharia filed a second amended complaint, which the District Court dismissed in part on April 20, 1998.[3]

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2. Respondents cite to the Record on Appeal with the format "R. __."

3. Dr. Vakharia asserts that the Hospital's motion to strike and dismiss the second amended complaint "was denied on April 20, 1998." (Pet. at 4.) In fact, the District Court granted the Hospital's motion to dismiss Counts II, IV, and VI of the second amended (Cont'd)

(R. 187.) After almost seven years of litigation, Dr. Vakharia's allegations were whittled down to two claims: (1) Count 1, alleging an improper delay in processing Dr. Vakharia's application under 42 U.S.C. § 1981; and (2) Count III, alleging a breach of the Hospital's bylaws. On April 13, 1999, Dr. Vakharia sought leave to file a third amended complaint, which the District Court denied on the grounds of futility and delay. (R. 205.)

### 2. The Hospital's Motion for Summary Judgment.

The Hospital moved for summary judgment on August 15, 2001. (R. 233–34.) Vakharia failed to meet three court-imposed deadlines for responding to the Hospital's motion for summary judgment. The District Court's lenient grants of numerous opportunities for Dr. Vakharia to file her response were met with continued delays and obstruction. (R. 238–41.) Due to Dr. Vakharia's delays, the Hospital moved to bar Dr. Vakharia's response. (R. 242.)

On November 13, 2001, just days prior to oral argument on the Hospital's motion to bar Dr. Vakharia's response, Dr. Vakharia moved for leave to file a response, together with her motion for leave to file a brief in excess of fifteen pages. (R. 244.) Dr. Vakharia's proffered response ignored the District Court's prior orders, the Federal Rules of Civil Procedure, and Local General Rules for the United States District Court for the Northern District of Illinois

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(Cont'd)

complaint, granted the Hospital's motion to strike Count V, but denied the Hospital's motion to strike certain allegations of Counts I and III. (R. 187.)

("Local Rules") governing summary judgment motions. (R. 243, 278.) *See* Fed. R. Civ. P. 56; Local Rule 56.1(b).[4]

Examples of the multiple missteps in Dr. Vakharia's pleadings included arguments made without citation to evidence, citations to lengthy documents lacking any specificity, and attempts to raise arguments related to dismissed counts of the second amended complaint. (R. 278.) On November 16, 2001, the District Court heard and granted the Hospital's motion to bar and strike Vakharia's untimely and otherwise faulty response, including all supporting documents, in its entirety, and imposed $2,500 in sanctions. (R. 243.) The District Court allowed Dr. Vakharia until November 30, 2001, to file a proper response that complied with all the District Court's prior orders and conformed to the Federal and Local Rules. The District Court cautioned Dr. Vakharia that if she did not comply, the result would be a ruling on the Hospital's motion for summary judgment without the benefit of any response from Dr. Vakharia. (R. 243.)

On November 30, 2001, Dr. Vakharia filed her second response. This pleading suffered from many of the same

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4. Local Rule 56.1 provides, in part,

> [e]ach party opposing a motion filed pursuant to Fed. R. Civ. P. 56 shall serve and file — (1) any opposing affidavits and other materials referred to in Fed. R. Civ. P. 56(e); (2) a supporting memorandum of law; and (3) a concise response to the movant's statement that shall contain [ ] a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon. . .

defects as the first response. (R. 245–48.) The Hospital filed another motion to strike the second response, citing but a few examples of the many deficiencies in the second response. (R. 249.) The District Court agreed with the Hospital, describing several problems present in the second response in an attempt to provide Dr. Vakharia with guidance on how to make the second response conform. (R. 278.) On January 15, 2002, the District Court issued an order striking the second response in its entirety and granting Dr. Vakharia one last opportunity to cure the defects in her pleadings. (R. 255.)

Dr. Vakharia filed her third response on February 1, 2002. (R. 256–59.) Once again, the pleadings contained countless defects, including argument improperly addressing matters previously dismissed from the litigation and failing to provide specific citations to admissible evidence. Worse, these errors had persisted despite repeated requests and warnings by the District Court that such defects would result in the pleadings being stricken pursuant to Local Rule 56.1. Accordingly, the Hospital filed its third motion to strike Dr. Vakharia's response. (R. 262.)

Finally, on March 28, 2002, the District Court entered an order striking Dr. Vakharia's third response to the Hospital's summary judgment motion, denying Dr. Vakharia's request for leave to file yet another amended complaint, and granting the Hospital's motion for summary judgment on all counts. (R. 268.) Dr. Vakharia appealed, arguing that (1) the District Court improperly struck her response to the Hospital's summary judgment motion; (2) improperly denied her request for leave to file an amended complaint; and (3) erroneously granted summary judgment in favor of the Hospital.

### 3. The Court of Appeals Affirms.

On March 25, 2003, the Court of Appeals issued an unpublished order affirming the District Court's opinion. After a careful review of the record, the Court of Appeals determined that (1) the District Court did not abuse its discretion when it struck Dr. Vakharia's response to the Hospital's motion for summary judgment because Dr. Vakharia "ignored the court's admonishments and cannot now claim that the court treated her unfairly after it patiently tolerated her disregard of its orders" (Pet. at App. 5); (2) the District Court did not abuse its discretion when it denied Dr. Vakharia's request for leave to file a third amended complaint on the grounds of futility and delay (Pet. at App. 6); and (3) the District Court properly granted the Hospital's motion for summary judgment on Counts I and III because "[t]here was no evidence upon which the court could have *denied* summary judgment" (Pet. at App. 7 (emphasis added)). The Court of Appeals denied Dr. Vakharia's petition for rehearing on April 22, 2003. (Pet. at App. 22.) Dr. Vakharia's petition for a writ of certiorari followed.

## REASONS FOR DENYING THE PETITION

### A. This Court Should Deny the Writ on Dr. Vakharia's First, Third, and Fourth Questions Presented Because the Court of Appeals Properly Determined That the District Court Did Not Abuse Its Discretion by Striking Petitioner's Deficient Response After Three Opportunities to File a Conforming Submission and Granting Summary Judgment on the Remaining Record.

Dr. Vakharia's first, third, and fourth Questions Presented are based on the erroneous premise that the District Court granted the Hospital's motion for summary judgment because Dr. Vakharia violated Local Rule 56.1. Instead, the Court of Appeals properly understood that the District Court engaged in a two-step process: first deciding that Dr. Vakharia's repeated refusal to conform her response to its orders and to the Federal and Local Rules concerning summary judgment warranted striking her entire proposed third response; and then, based on the remaining record, determining that no genuine issue of material fact precluded the entry of summary judgment in favor of the Hospital. The Court of Appeals fully considered the issues below, and correctly affirmed the opinion of the District Court.

#### 1. The District Court Properly Struck Dr. Vakharia's Third Response Because It Failed to Comply with the Federal Rules, Local Rules, and the District Court's Prior Orders.

The Seventh Circuit Court of Appeals has consistently upheld the discretion of a district court to demand strict compliance with local rules concerning summary judgment.

*Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 527 (7th Cir. 2000). Procedures for structuring the summary judgment process are vital because they "assist the court by organizing the evidence, identifying undisputed facts, and demonstrating precisely how each side propose[s] to prove a disputed fact with admissible evidence." *Id.* (quoting *Markham v. White*, 172 F.3d 486, 490 (7th Cir. 1999).) Despite Dr. Vakharia's attempts to categorize this rule as oppressive and contrary to the interests of justice (Pet. at 9–11), such rules serve to streamline the operation of the courts by exposing whether any genuine issue of material fact remains in the case.

When responses to summary judgment contain evasive answers, improper legal argument, and fail to provide specific citations to facts precluding summary judgment, a District Court is well within its discretion to strike the entire response. *Bordelon*, 233 F.3d at 527. Although her Petition suggests otherwise (Pet. at 8–11), the District Court demonstrated a great deal of leniency regarding Dr. Vakharia's repeated delays (R. 238–41) and provided Dr. Vakharia with clear instructions on how to submit an appropriate response (R. 278). Despite these multiple opportunities to submit a conforming response, Dr. Vakharia's third response was improper for a variety of reasons.

**(a) Dr. Vakharia's Third Response Lacked the Requisite Specificity.**

The third response's first failing was a lack of specificity. Dr. Vakharia's statement that she did provide "65 citations to specific paragraphs" (Pet. at 12) lends no support to her argument because it fails to address two fundamental issues: (1) many of the remaining factual citations were sweeping

references to piles of exhibits without any specificity or explanation of why the cited materials were relevant; and (2) many legal citations consisted solely of statements of well-settled law without providing any analysis of how the principles applied to her case.[5] Both the District Court and the Court of Appeals referenced these failings in their rulings. (Pet. at App. 5, 16–17.)

**(b) Dr. Vakharia Failed to Cite Proper Evidence.**

Similarly, Dr. Vakharia's complaint that the non-moving party "may lose whichever way he turns" (Pet. at 15) if a district court applies Local Rule 56.1 to require citation to proper evidence is nonsensical. First, the District Court did not strike Dr. Vakharia's entire response on the basis of a single absence of citation. Rather, as the District Court observed, Dr. Vakharia's third response was replete with inferences and opinions not substantiated by specific facts, in direct contravention of the District Court's prior orders. (R. 278; Pet. at App. 16–17.) *Compare Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998) (noting that such inferences are permissible, but only if supported by specific facts).

Second, there is no reasonable risk that a non-moving party could be confused as to what type of evidence may be

5. Similarly, Dr. Vakharia's complaint that the District Court improperly invoked Federal Rule of Civil Procedure 12(f) when striking her pleadings (Pet. at 11) fails because the District Court's opinion is replete with references to Local Rule 56.1, and sets forth and applies the standards of Local Rule 56.1. The District Court's one-time reference to Rule 12(f) was a harmless scrivener's error. *See O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 986 (7th Cir. 2001).

cited. The Seventh Circuit has taken a clear position that the evidence submitted in support of a response to a summary judgment motion need not be admissible at trial. *See, e.g., Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 921 (7th Cir. 1994). However, the evidence set forth must be of a *kind* admissible at trial. *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 849 (7th Cir. 1992). Federal Rule 56(e) likewise requires that affidavits offered in opposition to summary judgment must be made on personal knowledge and set forth facts that would be admissible in evidence.

**(c) Dr. Vakharia's Third Response Failed to Conform with Prior Orders of the District Court.**

A third reason the District Court struck Dr. Vakharia's third response was her abject failure to comply with the District Court's prior orders. The District Court twice rejected Dr. Vakharia's claims regarding the formation of Evergreen during the course of the proceedings, and dismissed all of her claims on that matter. (R. 123, 230.) Nonetheless, Dr. Vakharia included argument related to Evergreen in both her first and second responses to the Hospital's motion for summary judgment. Each time, the District Court identified the sections of the responses dealing with Evergreen as improper on the grounds that the District Court had already decided the Evergreen issue. (R. 243, 255.) Despite the District Court's prior warnings, Dr. Vakharia intertwined argument concerning Evergreen throughout her third response, providing another reason for the District Court's decision to strike her entire responsive submission. (Pet. at App. 6.) The Court of Appeals rightly cited Dr. Vakharia's "continual disregard for the court's previous orders" as ample justification for this action. (Pet. at App. 4.)

### (d) Therefore, the Court of Appeals Correctly Affirmed the District Court's Decision to Strike Dr. Vakharia's Non-Conforming Third Response.

Given the District Court's patient tolerance of Dr. Vakharia's repeated disregard of its orders, the Court of Appeals properly held that neither the District Court nor the Hospital had any obligation to pore over Dr. Vakharia's pleadings to determine which issues were actually disputed matters of fact. (Pet. at App. 5.) *See Greer v. Bd. of Educ.*, 267 F.3d 723, 727 (7th Cir. 2001). It is clear that Dr. Vakharia's third response was not stricken as the result of "one misstep," (Pet. at 8), as Dr. Vakharia suggests. Instead, Dr. Vakharia missed multiple deadlines and requested numerous extensions. (R. 238–41.) Even with the benefit of extra time and the District Court's guidance on how to correct the problems in the second response (R. 278), Dr. Vakharia submitted a third response lacking citations to admissible evidence and containing arguments the District Court had specifically excluded in prior orders. As such, the District Court did not abuse its discretion in striking Dr. Vakharia's entire third response, and the Court of Appeals rightly affirmed that decision.

## 2. The District Court Properly Granted Summary Judgment Because the Hospital Demonstrated That No Genuine Issue of Material Fact Precluded Summary Judgment.

After determining that the District Court properly struck Dr. Vakharia's third response, the Court of Appeals proceeded to review the District Court's grant of summary judgment *de novo*, "viewing all facts and drawing all reasonable

inferences in the non-moving party's favor." (Pet. at App. 6.) Because the District Court struck Dr. Vakharia's third response, all material facts set forth in the Hospital's Local Rule 56.1 statement of material facts were deemed admitted. *See* Local Rule 56.1(a)(3)(B). Applying the familiar standard that summary judgment is proper when there is no genuine issue as to any material fact,[6] *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986), the Court of Appeals correctly concluded that "[t]here was no evidence upon which the court could have *denied* summary judgment." (Pet. at App. 7 (emphasis added).)

Summary judgment was appropriate in this case because not only did the Hospital meet its burden of demonstrating the absence of a genuine issue of material fact, Dr. Vakharia utterly failed to identify genuine issue of material fact precluding summary judgment. As noted by the District Court, it is not the District Court's responsibility to "scour the record in search of a genuine issue of [material] fact." *Brasic v. Heinemann's, Inc.*, 121 F.3d 281, 285 (7th Cir. 1997). Nor is it the role of the District Court to "research and construct the legal arguments open to parties." *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996). The Hospital's submissions clearly illustrated that Dr. Vakharia's largest complaints, delay in processing Dr. Vakharia's application for privileges and breach of the Hospital bylaws, were either the result of Dr. Vakharia's own dilatory tactics (the delay) or nonexistent (breach of the

6. This Court has held that if the non-movant does not present evidence that would reasonably permit the finder of fact to rule in its favor on a genuine issue of material fact, then the court must enter summary judgment against it. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).

bylaws). (Pet. at App. 20–21.) Simply put, Dr. Vakharia failed to present sufficient evidence to oppose summary judgment.

### 3. These Facts Do Not Warrant the Exercise of This Court's Supervisory Powers.

The Court of Appeals' order is rooted in the sound application of fundamental legal principles to the unique facts of this case, and is not an appropriate candidate for review under this Court's supervisory authority. In no way has the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" in this case. Sup. Ct. R. 10(a). This is a simple case of faulty pleading and of a record that fails to demonstrate any violation of Dr. Vakharia's right to be free from employment discrimination. As the Court of Appeals so succinctly put it, "Vakharia had eight years to present a claim that passed muster and she failed to do so." (Pet. at App. 5.) Furthermore, because review of the District Court's application of its own local rules will not affect other Circuit Courts of Appeals, these questions are particularly inappropriate for review.

### 4. The Cases Cited by Dr. Vakharia Are Not in Conflict with the Order Below.

Dr. Vakharia also argues that there is a split of authority among the Courts of Appeals on whether a court may grant summary judgment "because the opposing party violated the local rule." (Pet. at 18.) Each of the cases Dr. Vakharia cites as allegedly conflicting with the order below is plainly not in conflict with the decision of the Court of Appeals. The cases are distinguishable, first and foremost, because

the order of the Court of Appeals below did *not* condone the grant of summary judgment as punishment for a single violation of a local rule. Instead, the Court of Appeals recognized that the District Court struck the response as the punishment for violating the Federal and Local Rules after giving Dr. Vakharia multiple opportunities to submit conforming papers, and only then proceeded to apply standard summary judgment analysis to the record before it. (Pet. at App. 4.)

One of the cases Dr. Vakharia cites, *Stough v. Mayville Community Schools*, 138 F.3d 612 (6th Cir. 1998), exemplifies the error of Dr. Vakharia's argument. In *Stough*, the Court of Appeals reversed because the District Court expressly stated that its grant of summary judgment followed automatically from the non-movant's failure to file a response within the time mandated by the local rule. 138 F.3d at 614–15 (holding that the automatic grant of summary judgment based on the opponent's violation of a local rule improperly relieved the movant of its burden of demonstrating the absence of a genuine issue of material fact); *see also John v. Louisiana Board of Trustees for State Colleges and Universities*, 757 F.2d 698, 708–09 (5th Cir. 1985) (same). *United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999), on the other hand, merely stands for the proposition that local rules cannot trump federal rules. 166 F.3d at 1125 (holding that the Federal Rules of Evidence are unaffected by state rules of professional conduct).

In sum, the Hospital takes no issue with the general legal principle that "a motion for summary judgment cannot be granted simply because the opposing party violated a local rule," *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995). Rather, the Hospital argues that this proposition simply has

no bearing on the facts in the instant case. The District Court held, and the Court of Appeals affirmed, that the Hospital demonstrated that no genuine issue of material fact precluded judgment for Defendants. No disagreement among the Courts of Appeals would be resolved by granting the petition in this matter.

Accordingly, for all these reasons, the writ should be denied as to Dr. Vakharia's Questions One, Three, and Four.

**B. The Writ Should Be Denied on Dr. Vakharia's Second Question Presented Because Dr. Vakharia Did Not Raise the Issue Below.**

In addition to suffering from one of the same flaws as Questions One, Three, and Four, namely that Question Two conflates the two-step process of striking a pleading for non-conformance with Local Rule 56.1 and granting summary judgment due to the absence of a genuine issue of material fact, Question Two suffers from the additional problem that it was not raised or addressed in the District Court or the Court on Appeals below. Dr. Vakharia's opening brief before the Court of Appeals conceded that the standard of review for the District Court's order striking her response to the Hospital's motion for summary judgment under Local Rule 56.1 is abuse of discretion, and that a grant of summary judgment is reviewed de novo.[7] (Principal Br. of

7. Dr. Vakharia initially argued that the District Court struck her third response under Federal Rule of Civil Procedure 12(f), and that such action was improper. Accordingly, the "Standard of Review" section of Dr. Vakharia's principal brief states that issues related to a district court's authority under Rule 12(f) are reviewed de novo, but admits in the following sentence that if the Court of (Cont'd)

Pl.-Appellant at 2.) Since Dr. Vakharia did not urge the Court of Appeals to review the District Court's Local Rule 56.1 determination under any other standard of review, she waived this argument before this Court.

## CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(Cont'd)
Appeals held that the third response was stricken under some other rule, *e.g.*, Local Rule 56.1, the standard of review would be abuse of discretion. (Principal Br. of Pl.-Appellant at 2.)

(3)

Supreme Court, U.S.
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No. 03-227

In The

# Supreme Court of the United States

USHA VAKHARIA, M.D.

*Petitioner,*

v.

LITTLE COMPANY OF MARY HOSPITAL & HEALTH CARE CENTERS, et al.,

*Respondents.*

**On Petition For Writ of Certiorari To the United States Court of Appeals For The Seventh Circuit**

## REPLY TO BRIEF IN OPPOSITION

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15 pp

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## ARGUMENT

### A. Respondents' Statement of Facts Does Not Relate to the Issues To Be Decided By The Court

The Respondents' recitation of the facts (some of which have no support despite citations to the record) in essence misses the point because this case concerns the failure of the court to consider the rebuttal to that recitation. For example, the respondents state that petitioner asked to be assigned to the anesthesia department on an "as needed" basis while the district court itself held that she applied for a position in both the OB/GYN and surgical sections of the department (App 10). The surgical position was a full time position for which she was not considered. The issues of discrimination and bylaw violation revolved around whether she was classified as "as needed" or full-time. The respondents' statement of facts therefore is essentially a wish list which would not be found to exist had the petitioner's response been considered. The relevant facts, insofar as this petition is concerned, are those which bear upon whether the court properly struck that response.

### B. Respondents' Justification for the "Strict" Enforcement Is In Conflict With F.R.Civ.P. 56

While the Respondents agree that "a motion for summary judgment cannot be gratned simply because the opposing party violated a local rule" they state that it is proper to strike the response "as the punishment" if there are "multiple" violations (Resp. p.18). The Respondents overlook the conflict between the "strict application" or "penalty" approach and F.R.Civ.P. 56 as explained by this court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133 (2000). where this court required that a court should review all of the evidence in the record.

Under the "strict" application of Local Rule 56.1 authorized by the Seventh Circuit, the power of the district court to enact local rules pursuant to F.R.Civ.P. 83 authorizes the district court in its unbridled discretion to dispense with reviewing the entire record by striking the entire response if there are unspecified paragraphs not in conformity with the court's interpretation of local rule and to ignore genuine issues of fact, if they are not brought to the court's attention in conformity with the court's interpretation of the local rule.

This court established the principle regarding local rules in *Frazier v. Heebe*, 482 U.S. 641 (1987) holding that "A district court's discretion in promulgating local rules is not, however, without limitation. This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with 'the principles of right and justice.'" (citations).

### C. The Conflict Between the Seventh Circuit And Other Circuits Is Not Explained By Respondents

The respondents seek to distinguish *United States v. Lowery, 166 F.3d 1199* (11th Cir. 1999) on the ground that it merely stands for the proposition that the Federal Rules of Evidence are unaffected by state rules of professional conduct (Resp. 18). The proffered distinction based on state versus local federal rules, however, does not withstand scrutiny. In *Lowery, Id,* 166 F.3d at 1125, the court held that even if a plea agreement ... violated a local state or district court rule, such witness's testimony could not be excluded on the basis of this rule because Federal

Rule of Evidence 402 provides that "All evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to its statutory authority."

To say that the instant case is not inconsistent with *Frazier* and *Lowery* is disingenuous at best because, by asserting a violation or violations of a local Rule 56.1, the District Court has excused itself from looking at all the facts thus effectively barring evidence which must be considered under F.R.Civ.P. 56.

The distinction which respondents offer for *John v. State of La. (Board of Trustees for State Colleges and Universities,* 757 F.2d 698 (5th Cir. 1985) is likewise nonexistent. In that case, the court held that, at a minimum, the District Court must deny a motion for summary judgment if it sees an issue of fact regardless of whether it was pointed out or not by the party opposing the motion, citing 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d §2720, at 757 F.2d at 712:

> [T]he determination whether a genuine issue concerning a material fact exists is itself a question of law that must be decided by the court. It does not depend upon whether either or both of the parties may have thought about the matter.

The court also cited with approval., 757 F.2d at 712, the case of *Keiser* v. *Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) in which the court stated:

> [A] court can only enter a summary judgment if *everything* in the record--pleadings, depositions,

> interrogatories, affidavits, etc.--demonstrates that no genuine issue of material fact exists. Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention--the court must consider both before granting a summary judgment. (emphasis in original)

**D. The Respondents Do Not Respond to Conflict Between The Circuit Courts On The Issue Of When A Response May Be Stricken**

The respondent seeks to distinguish *Stough v. Mayville Community Schools*, 138 F.3d 612 (6th Cir. 1998) on the ground that it merely stands for the proposition that the district court erroneously dismissed the plaintiff's complaint automatically because she violated a local rule in responding to a motion for summary judgment. In *Stough,* the court held that the court could not dismiss the case unless it has made a specific finding of bad faith or contumacious conduct with prejudice to the moving party or there was an act tantamount to such conduct, *Id.*, 138 F.3d at 615. In most analogous situations, this court and others have followed that standard. See. e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Mulbah v. Detroit Board of Ed.ucation*, 261 F.3d 586, 591 (6th Cir. 2001).

**E. To Strike An Entire Response On The Basis Of Inadmissible Evidence Is A Violation Of F.R.Civ.P. 56 And Contrary to The Practice Followed Elsewhere**

Following the principle enunciated in *Lowery,* the Fifth Circuit has held that if an affidavit contains inadmissible evidence, only the inadmissible portions should be stricken

and that it is error to strike the entire affidavit, *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992). One basis for striking the response in the instant case, as stated by the district court , was that plaintiff cited "her own self-serving letters and affidavits." This holding also was clearly wrong because it constituted weighing of evidence, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). The Court of Appeals abandoned that explanation but justified the striking of the affidavits (and everything else) on the ground that the affidavits had to be based on personal knowledge (App. 7). In terms of admissibility, the only claim respondents make is that affidavits offered in opposition to summary judgment must be on personal knowledge and set forth facts that would be admissible in evidence (Resp. 14). If the district court was wrong on what was admissible, it does more than strain credulity to believe that a decision to strike the entire response could be justified on an entirely new ground of inadmissibility. Assuming *arguendo* that there was some inadmissible testimony in the affidavits, it does not constitute a lack of good faith, and the question is whether a court may strike an entire response on some ground other than good faith.

Had the case gone to trial, any claim of inadmissible evidence would be dealt with on an individual basis as the testimony or exhibit was offered. The defendants had filed a motion to strike specific portions of the exhibits and statement of facts. Had the court ruled on this motion, it would have been possible to know what was ruled inadmissible and what was not. In this instance, the court's ruling is tantamount to granting a directed verdict motion because the plaintiff offered her own testimony or was asked to relate something which was hearsay.

## F. The Respondents' Argument Regarding Specificity Lacks Specificity

Respondents defend the "strict interpretation" approach on the ground that there were "multiple" failures to be specific (Resp. 12-13).[1] At what point "multiple" failures reach the stage where they justify striking everything is not mentioned. They accept that the district court was wrong in saying that the petitioner failed to cite specific paragraphs in affidavits when in fact she had done so on all 65 occasions (Resp. 12). Respondents fail to explain, assuming there was some statement, or statements of fact, which the court found to be improperly supported by reference to "piles" of exhibits, how the striking of all of the statement of facts and exhibits is justifiable unless one takes the position that a violation of Local Rule 56.1 authorizes a departure from the usual norm of viewing all of the evidence.

## G. The Content of The Memorandum Cannot Form the Basis For Striking An Entire Response

Although the respondents make much of the word "specificity," nowhere in their statement of facts or argument do they specify whether it is the petitioner's memorandum, statement of facts or response to statement of facts which was not sufficiently specific.

The district court was referring to the plaintiff's memorandum in saying that "Vakharia's memorandum ... is replete with legal and factual conclusions without any basis to support them" and "Vakharia's only use of case law is to state well-settled law without going into any analysis

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[1]Local Rule 56.1 does not specify what level of specificity in the citation to the record is required, e.g., page number, paragraph, line or specific sentence or word(s). Each district judge is free to interpret it in any manner he or she chooses.

as to how they should be applied in this instance" (App.16-17) Outside of a citation to an opinion of Learned Hand which the court did not understand (App. 17), there is no other citation specified.

There is absolutely nothing in Local Rule 56.1 relating to the content of the plaintiff's memorandum. Regardless of the standard the court would adopt, it is therefore impossible for the petitioner to be properly sanctioned for violation of the local rule when the rule did not have any provision dealing with that subject, *Amnesty America v. Town of West Harftord,* 288 F.3d 467, 471 (2nd Cir. 2002).

Respondents characterize the district court's citation of F.R.Civ.P. 12(f) as authority for striking the response as a mere "scrivener's error." (Resp. 19 fn. 7). However, in view of the district court's criticism, which focused on the Petitioner's memorandum, it may have been viewed by him as justification for striking the response of the basis of the memorandum. However, as noted in 3 *Moore's Federal Practice 3rd Ed.* §12.10(13), Rule 12(f), which deals with striking "pleadings," has no place in the context of summary judgment motions. Under F.R.Civ.P. 7(a), a "pleading" is a complaint, answer, reply to a counterclaim, cross-claim, answer to cross-claim, third party complaint or third party answer. In the Northern District of Illinois and elsewhere, it has been held that memoranda, statements of fact and affidavits filed in connection with summary judgment motions are not subject to being stricken pursuant to Rule 12 (f), *Equal Employment Opportunity Commission v. Admiral Maintenance Service,* 174 F.R.D. 643 (N.D. Ill. 1997) and cases cited therein.

Most importantly, this alleged deficiency has no place if the standard is bad faith or willfulness. If a party's response to a particular fact allegation in a statement of

fact is not sufficiently specific, the court may strike it. But to say that a court may find fault with someone's memorandum and/or certain responses to facts and then strike the entire response is to make a mockery of this court's holding regarding F.R.Civ.P. 56.

## H. Timeliness Is Not A Matter On Which A "Penalty" May Be Exacted or "Bad Faith" May Be Found

In *Marshall v. Gates*, 44 F.3d 722 (9th Cir. 1995), the court held that summary judgment could not be entered simply because the party opposing the motion filed his response late. On p.18 of their brief, the respondents "take no issue" with that case. However, the respondents contend that the striking was permissible because "... Dr. Vakharia missed multiple deadlines and requested numerous extensions" (Resp. 15). This sentence implies that Vakharia missed the deadline and was late when the court struck her response. The respondents are creating a false impression by that line of argument. In the Court of Appeals Brief, p. 22 fn. 5, respondents stated "Vakharia is correct in her assertion that her third attempt to respond to the Hospital's motion for summary judgment was filed in a timely manner" and admit that District Court was in error in stating that the response was filed late .

Respondents, however, apparently are claiming that, regardless of the lack of bad faith or willfulness, the court was entitled to "penalize" the petitioner for some other, unspecified, problems in her past response and to belatedly increase the penalty to striking her entire timely response[2]

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[2]Plaintiff filed motions for extension in all instances except on one occasion, when she was eleven days late (R. 278) in November 2001, and the court fined plaintiff $2,500.00. There were no multiple violations.

## I. Petitioner Cannot Be Sanctioned For Responding To Facts And Arguments Made By The Moving Party In A Summary Judgment Motion

Another of the respondents' arguments is that the district court properly struck Vakharia's third response because "Vakharia submitted a third response containing arguments the District Court has specifically excluded in prior orders" (Resp. p.15) which "intertwined argument concerned Evergreen throughout her third response, providing another reason for the District Court's decision (Pet. at App.6)." However, in their brief in opposition, the respondents devote an entire section of their Statement of Facts to "Selection of Evergreen as Exclusive Anesthesia Practice" (Resp. 4-5) , as they did in the district court in a discrimination case, asserting that the selection process was done in a nondiscriminatory manner. Nevertheless, as they see it, the District Court properly struck the petitioner's response because she cited facts and submitted evidence that the selection process was discriminatory and contrary to the by-laws to refute the respondants' claims.

Similarly, in Section 3 of the Statement of Facts of the respondants' brief in opposition, they assert that Dr. Vakharia was given a fair hearing to challenge the determination that she improperly rejected the "part-time" contract offered by Evergreen and failed to identify any violations of the Hospital's bylaws (Resp. p.5). Again, the respondants argue that the district court properly struck the petitioner's response in the district court because she rubutted their arguments and provided documentary evidence that she was full-time. [3]

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[3]It was this argument of Petitioner to which reference is made on p. 15 of Respondents' Brief where it states, "Dr. Vakharia submitted a third response ... containing arguments the District Court had specifically excluded in prior orders." Petitioner did not seek recovery on that basis.

Under Federal Rule 56 (e), (A)n adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ..." Local Rule 56.1(b(3)(B) itself states "All material facts set forth in the statement of the moving party will be deemed admitted unless controverted by the statements of the opposing party." A party responding to summary judgment cannot be sanctioned for responding to facts and argument made by the moving party. An order proscribing such response would be contrary to F.R.Civ.P. 56.[4]

## CONCLUSION

Wherefore, Petitioner, Usha Vakharia, M.D., respectfully requests this Court to grant the writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted

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[4]Respondents' claim that petitioner has waived the issue of abuse of discretion standard is also unavailing as these issues are intertwined and petitioner did present arguments on these issues on appeal.